Lee Seng Kee v Sukatno (Ong Thean Soo, third party)

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–186 OF 2001
VT SINGHAM J
23 MAY 2008

Tort — Damages — Loss of earnings — Plaintiff illegal worker — Whether plaintiff could claim loss of earnings

Tort — Negligence — Claim for contribution — Third party brought in by defendant but defendant found to be not liable — Whether brought in as joint tortfeasor — Whether third party could be found directly liable to plaintiff's claim

Tort — Negligence — Contributory negligence — Two versions of plaintiff's evidence — Whether sessions court judge's finding of 50:50 liability should be set aside — Whether liability should always be apportioned 50:50 in order to decide a running down case

The appellant appealed against the decision of the learned sessions court judge who had found the appellant 50% liable to the respondent's claim in tort of negligence and 50% contributory negligence against the respondent and dismissed the appellant's claim against the third party. According to the respondent's statement of claim against the appellant, the respondent had suffered personal injuries and losses arising out of a road accident involving motor van No WR 5906 which was allegedly driven negligently by the appellant and collided into the respondent who was a pedestrian on the same side of the road. Before the trial commenced, the appellant had obtained leave to include the driver of a motorcar No ACN 3772 as a third party. The appellant's third party notice against the third party was to claim for indemnity and contribution, in the event the appellant was found to be liable to the respondent's claim. The appellant had alleged in the statement of claim against the third party that the accident was caused wholly or partly by the negligent driving of the third party whereby the third party had collided into the respondent which had caused the respondent to flung towards the direction of the appellant. The third party pleaded, inter alia, that the accident was caused by the negligent driving of the defendant who knocked into the respondent who was on the correct side of the road and had pleaded particulars of negligence against the defendant. The notes of evidence were recorded by two sessions court judges, the grounds of judgment was given by

A the third succeeding sessions court judge. The learned sessions court judge did not accept both the versions of the respondent and the appellant found that the respondent was crossing the road when he was knocked by the appellant. The reason given by the learned sessions court judge for dismissing the appellant's claim against the third party was that the third party was not
B involved in the accident where the respondent had suffered injuries. The appellant was also dissatisfied with the award of damages to the respondent, namely, RM153,600 awarded as loss of earnings at RM800 per month for 16 years, on the grounds that it was gained through illegal earnings and had appealed against this award.
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Held, allowing the appeal with costs:

D (1) In the absence of any reason having been given by the learned sessions court judge for not accepting the appellant's version as the probable version for the accident and the fact that he did not hear or see the respondent and the appellant giving evidence, the court was justified in considering the totality of the evidence as recorded with the admissible
E documents to determine the probable cause of how the accident had occurred and to consider from which side of the road was the respondent crossing the road before he was thrown into the path of the appellant's motorvan (*Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle* [1927] AC 37) (see para 33).
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(2) The learned sessions court judge did not seem to have considered judicially or directed his mind to the particulars of negligence as pleaded in the statement of claim when he arrived at his decision. Had he considered the pleadings together with the appellant's version of how
G the accident had occurred, he would have accepted the appellant's version as inherently more probable. The appellant could not be found to be 50% negligent because, as testified by the appellant, the respondent was initially knocked along the other side of the road (opposite side) of appellant's right of travel and flung to his side of the
H road (see para 58).

(3) The third party had taken a great risk at the sessions court by submitting, 'No case to answer', where the totality of the evidence attracted a reasonable inference to be drawn that the third party's
I motorcar was involved in the collision with the respondent and that the appellant's version was inherently more probable and was likely to be the truth of how the accident had occurred (see para 63).

(4) As to the apportionment of liability on 50:50 basis, it should not be applied mechanically or import such a finding or apportionment from

another case. Liability could not be apportioned mechanically on 50:50 in order to decide a running down case as each case was based on its own sets of facts. However, since the respondent had failed to establish negligence against the appellant on the balance of probabilities and he did not include the third party as a joint tortfeasor, there was no nexus in law between the respondent and the third party. Accordingly, the third party could not be directly found liable to the respondent's claim. Since this court had found the defendant not to be negligent for the accident, the claim for contribution and indemnity by the appellant against the third party did not arise (see paras 68 & 94).

(5) Further, if the respondent's income was found to be from illegal earnings, the court could not convert it into legal earnings in order to entertain or accommodate the respondent's claim for loss of future earnings, however serious his injuries might be. The respondent's evidence that he had a valid work permit was challenged by the defence who had sufficiently casted doubt on his bare evidence that he had a valid work permit (see para 117).

[Bahasa Malaysia summary

Perayu merayu terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah memutuskan bahawa perayu 50% bertanggungan terhadap tuntutan responden dalam kecuaian tort dan 50% kecuaian sertaan terhadap responden dan menolak tuntutan perayu terhadap pihak ketiga. Menurut pernyataan tuntutan responden terhadap perayu, responden mengalami kecederaan diri dan kerugian akibat daripada kemalangan jalanraya tersebut yang melibatkan motorvan No WR 5906 yang dikatakan dipandu secara cuai oleh perayu dan melanggar responden seorang pejalan kaki di bahagian jalan yang sama. Sebelum bermulanya perbicaraan, perayu telah mendapat kebenaran untuk memasukkan pemandu motokar No ACN 3772 sebagai pihak ketiga. Notis pihak ketiga perayu terhadap pihak ketiga adalah untuk menuntut tanggung rugi dan sumbangan, jika perayu didapati bertanggungan terhadap tuntutan responden. Perayu mendakwa di dalam pernyataan tuntutan terhadap pihak ketiga bahawa kemalangan adalah keseluruhannya atau sebahagiannya disebabkan oleh responden yang tercampak ke arah laluan perayu. Pihak ketiga telah memplidkan bahawa, antara lain, kemalangan adalah disebabkan oleh kecuaian pemanduan defendan yang melanggar responden yang mana berada di bahagian kanan jalan dan telah memplidkan butiran-butiran kecuaian terhadap defendan. Nota keterangan telah direkodkan oleh dua hakim mahkamah sesyen, alasan penghakiman telah diberikan kemudian oleh hakim mahkamah sesyen yang ketiga. Hakim mahkamah sesyen yang bijaksana tidak menerima kedua-dua versi responden dan perayu dan telah mendapati bahawa responden sedang melintas jalan apabila beliau dilanggar oleh perayu. Alasan yang diberikan

oleh hakim mahkamah sesyen yang bijaksana dalam menolak tuntutan perayu terhadap pihak ketiga adalah, pihak ketiga tidak terlibat dalam kemalangan di mana responden telah mendapat kecederaan. Perayu juga tidak berpuas hati dengan award ganti rugi kepada responden, iaitu, RM153,600 diawardkan sebagai kehilangan pendapatan pada kadar RM800 sebulan untuk 16 tahun, atas alasan bahawa ianya diperolehi melalui pendapatan yang menyalahi undang-undang dan telah merayu terhadap award ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam ketiadaan alasan yang diberikan oleh hakim mahkamah sesyen yang bijaksana yang tidak menerima versi perayu sebagai versi yang berkemungkinan bagi kemalangan tersebut dan fakta bahawa beliau beliau tidak mendengar atau melihat responden dan perayu memberikan keterangan, mahkamah mempunyai alasan yang kuat dalam mempertimbangkan keseluruhan keterangan yang direkodkan dengan penerimaan dokumen-dokumen untuk menentukan sebab yang berkemungkinan, bagaimana kemalangan telah berlaku dan untuk mempertimbangkan dari bahagian jalan yang mana responden melintas jalan sebelum beliau tercampak ke laluan kenderaan perayu (*Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle* [1927] AC 37) (lihat perenggan 33).

(2) Hakim mahkamah sesyen yang bijaksana, jelas tidak mempertimbangkan secara kehakiman atau mengarahkan mindanya kepada butiran kecuaian seperti yang diplidkan di dalam pernyataan tuntutan apabila membuat keputusannya. Jika beliau mempertimbangkan pliding bersama-sama dengan versi perayu berkenaan dengan bagaimana kemalangan telah berlaku, beliau berkemungkinan menerima versi perayu sebagai yang sememangnya lebih berkemungkinan. Perayu tidak boleh didapati 50% cuai kerana, seperti mana keterangan yang diberikan oleh perayu, responden telah dilanggar dahulu di bahagian jalan yang lain (bahagian bertentangan) yang mana hak laluan perayu dan dan tercampak ke bahagian jalannya (lihat perenggan 58).

(3) Pihak ketiga telah mengambil risiko yang tinggi di mahkamah sesyen dengan menghujahkan bahawa 'tiada kes untuk dijawab', di mana keseluruhan keterangan telah menarik inferens yang munasabah bahawa kenderaan pihak ketiga telah terlibat di dalam perlanggaran dengan responden dan versi perayu adalah sememangnya lebih berkemungkinan dan lebih berkemungkinan benar tentang bagaimana kemalangan telah berlaku (lihat perenggan 63).

(4) Berkenaan dengan pembahagian liabiliti berdasarkan 50:50, ia seharusnya tidak digunakan secara mekanik atau mengimport keputusan atau pembahagian tersebut daripada kes lain. Liabiliti tidak boleh dibahagikan 50:50 secara mekanik untuk memutuskan kes kemalangan yang mana setiap kes adalah berdasarkan kepada set faktanya sendiri. Walau bagaimanapun, oleh kerana responden telah gagal untuk membuktikan kecuaian terhadap perayu atas imbangan kebarangkalian dan beliau tidak memasukkan pihak ketiga sebagai pelaku tort bersama (joint-tortfeasor), tidak terdapat hubungan dalam undang-undang di antara responden dan pihak ketiga. Sewajarnya, pihak ketiga tidak boleh didapati bertanggungan secara terus kepada tuntutan responden. Oleh kerana mahkamah ini telah mendapati defendan tidak cuai bagi kemalangan tersebut, tuntutan untuk penyumbangan dan gantirugi oleh perayu terhadap pihak ketiga tidak timbul (lihat perenggan 68 & 94).

(5) Selanjutnya, jika pendapatan responden didapati daripada perolehan yang menyalahi undang-undang, mahkamah ini tidak boleh menukarkannya kepada pemerolehan yang menurut undang-undang dalam melayani atau menyesuaikan tuntutan responden untuk kehilangan pendapatan akan datang, walau bagaimana serius kecederaannya. Keterangan responden yang beliau memiliki permit bekerja yang sah telah dicabar oleh pembelaan yang meletakkan kesangsian yang cukup ke atas keterangan kosongnnya bahawa beliau memiliki permit bekerja yang sah (lihat perenggan 117).]

Notes

For a case on claim for contribution, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 872.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 880–931.

For cases on loss of earnings, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 206–207.

Cases referred to

Abrath v North Eastern Rly (1883) 11 QBD 440 (folld)

Anthony a/l Arokyasamy Seemon v Mohamad Zailani Abdul Rahman & Anor [1996] MLJU 448 (refd)

Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Llyod's Rep 1 (refd)

Baker v E Longhurst and Sons Limited [1933] 2 KB 461 (refd)

Baker v Market Harborough Industry Corporative Society Ltd [1953] 1 WLR 1472 (refd)

Balasingham v PP [1959] MLJ 193 (folld)

Barclays Bank v Tom [1923] 1 KB 221 (refd)

Blay v Pollard and Morris [1930] 1 KB 628 (refd)

Burns v Devon's Iron Works Ltd [1961] SC 102 (refd)
Chew Soo Lan v Ludhiana Transport Syndicate & Anor [1976] 2 MLJ 205 (refd)
Chia Han Kiat v Rex [1937] MLJ 261 (folld)
Chih Lim Neo v Sit Hoon Neoh [1889] 4 KY 492 (refd)
Chua Chee Chor v Chua Kim Yong & Ors [1960] 1 MLJ 127 (refd)
Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor [1994] 1 MLJ 394 (folld)
Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34 (refd)
Chung Hwa Ying v Phang Mun Mooi & Anor [1987] 2 MLJ 693 (refd)
Daborn v Bath Tramways Motor Co Ltd & Trevor Smithey [1946] 2 All ER 333 (refd)
Development & Commercial Bank Bhd v Num Tjuan Sdn Bhd [1989] 1 MLJ 475 (refd)
Eden v Weardale Iron & Coal Company (1887) 35 Ch D 287 (refd)
Edison & Swan Co v Holland (1889) 41 Ch D 28 (refd)
Edwards (Inspector of Taxes) v Bairstow & Anor [1955] 3 All ER 48 (refd)
Euro-Diam Ltd v Bathurst [1990] 1 QB 1 (folld)
Fardon v Harcourt-Rivington [1932] All ER Rep 81 (refd)
Farrel v Secretary of State for Defence [1980] 1 All ER 166 (refd)
France v Parkinson [1954] 1 All ER 739 (refd)
Gulwant Singh v Abdul Khalik [1964] MLJ 286 (refd)
Haji Mohamed Dom v Sakiman [1956] MLJ 45 (refd)
Ho Kiong Chan v Patipet [1966] 1 MLJ 159 (refd)
How Paik Too v Mohideen [1968] 1 MLJ 51 (refd)
Jafri Elias v Khor Tang Seah [1992] 2 CLJ 601 (Rep); [1992] 2 CLJ 1016 (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Johara Bi bt Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139 (refd)
Jones v Great Western Railway Co [1930] 144 LT 194 (refd)
Joseph Eva Ltd v Reeves [1938] 2 All ER 115; [1938] 2 KB 393 (refd)
KR Taxi Service Ltd & Anor v Zaharah & Ors [1969] 1 MLJ 49 (refd)
Kelapa Sawit (Teluk Anson) Sdn Bhd v Yeoh Kim Leng & Ors [1991] 1 MLJ 301 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65 (refd)
Lai Yew Seong v Chan Kim Sang [1987] 1 MLJ 403 (refd)
Laurie v Raglan Building Co Ltd [1942] 1 KB 152 (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (refd)
Lee Hock Lai v Yeoh Wah Pein [1999] 5 MLJ 172 (refd)
Lee Thiam v Fatimah bt Salleh [1981] 1 MLJ 285 (refd)

Lim Chor Ching & Ors v Idris Abdul Karim & another appeal [1998] 3 CLJ Supp 145 (refd)
Lim Gaw Teong & Anor v Daniel & Anor [1968] 1 MLJ 277 (refd)
Lofthouse v Leicester Corporation (1948) 64 TLR 604 (refd)
Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor [1979] 2 MLJ 207 (refd)
McInness v Onslaw Fane & Ors [1978] 3 All ER 211 (refd)
Manager, Tuborg (Malaysia) Sdn Bhd v PP [1990] 2 MLJ 173 (refd)
Marpesia, The (1872) LR 4 PC 212 (refd)
Mat Abu bin Man v Medical Superintendant General Hospital Taiping, Perak & Ors [1989] 1 MLJ 226 (folld)
Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26 (refd)
Merchant Prince, The [1892] P 179 (refd)
Mohamed Alias v PP [1983] 2 MLJ 172 (refd)
Moni Kant Tiwari v Baburam Dixit AIR 1978 All 144 (refd)
Morris v Luton Corp [1946] 1 KB 114 (refd)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 184 (refd)
Muniyandi a/l Periyan & Anor v Eric Chew Wai Keat & Anor [2003] 3 MLJ 527 (refd)
Natesan v Goh Gok Hoon [1968] 2 MLJ 3 (refd)
Nazori bin Teh & Anor v Tay Lye Seng & Anor [1995] MLJU 154 (distd)
Neo Chan Eng v Koh Yong Hoe [1960] MLJ 291 (refd)
Ng Aik Kian & Anor v Sia Loh Sia [1997] MLJU 143 (refd)
Ng Chul Sia v Maimon bte Ali [1983] 1 MLJ 110 (folld)
Noorianti bt Zainal Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242 (folld)
Ong Yam Chong v Chan Wah [1962] MLJ 184 (refd)
Ogden Industries Pty Ltd v Lucas [1969] 3 WLR 75 (refd)
Ooi Han Sun v Bee Hua Meng [1991] 3 MLJ 219 (refd)
Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle [1927] AC 37 (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Ma'arif [1969] 2 MLJ 65 (refd)
Pacific Asia Leasing (M) Sdn Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku Kamil Ikram, third party) [1992] 2 MLJ 364 (refd)
Queen v O'Connell [1844] 7 Irish Law Reports 313 (refd)
R v Jaharjharia R Dalmia AIR 1946 PC 178 (refd)
R v Matheson [1958] 1 WLR 474 (refd)
Ranchod Bhai @ Somabhai v Babu Bhai AIR 1982 Guj 308 (refd)
Raghavamma v Chenchamma AIR 1964 SC 136 (refd)
Robins v National Trust Co Ltd [1927] AC 515 (refd)
Rumbold v London Country Council (1909) 25 TLR 541 (refd)
Schmidt & Anor v Secretary of State for Home Affairs [1969] 1 All ER 904 (refd)
Schwan – The Albano, The [1892] P 419 (refd)
Selvaduray v Chinniah [1939] MLJ 253 (refd)

Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286 (refd)
Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131 (refd)
Simirah v Chua Hock Lee & Anor [1963] MLJ 239 (refd)
Sivalingam Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Spedding v Fitzpatrick (1888) 38 Ch D 410 (refd)
Standard Securities Ltd v Hubberd & Anor (Telesurance third party) [1967] Ch 1056 (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490 (refd)
State of Punjab and Gurmej Singh v Jit Singh & Ors AIR 1994 SC 594 (refd)
Storey v Storey [1960] 3 All ER 279 (refd)
Tay Lye Seng & Anor v Nazori bin Teh & Anor [1998] 3 MLJ 873 (distd)
Teoh Guat Looi v Ng Hong Guan [1998] 4 MLJ 525 (refd)
Thackwell v Barclays Bank Plc [1986] 1 All ER 676 (refd)
Thompson v Birkley (1883) 47 LTR 700 (refd)
Tidui v Batman [1934] 1 KB 314 (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)
Virgil, The [1843] 2 WR 201 (refd)
Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (si mati) & Ors v TP Saffeer & Anor [1998] 3 AMR 2619 (distd)
Watt (or Thomas) v Thomas [1947] 1 All ER 582 (refd)
Winnipeg Electric Company v Jacob Geel [1932] AC 690 (refd)
Woon Ngee Yew & Ors v Ng Yoon Thai & Ors [1941] MLJ 37 (refd)
Wong Eng v Chock Man Chong & Ors [1963] MLJ 204 (refd)
Yeoh Cheng Han v Official Administrator, Malaya [1972] 2 MLJ 7 (refd)
Yuill v Yuill [1945] 1 All ER 183 (refd)

Legislation referred to

Civil Law Act 1956 ss 10, 12(1)(i), (iii), (v), 28A
Evidence Act 1950 ss 101, 102
Immigration Act 1963 s 6(1)
Subordinate Courts Rules 1980 O 12, O 12 rr 1(1)(a), 2(2)(a)

P Vivekanandan (Selvam, Nanda & Partners) for the appellant.
Inderjit Singh (Sandu & Co) for the respondent.
Ram Kumar (KB Tan Kumar & Partners) for the respondent/third party.

VT Singham J:

[1] This is an appeal by the appellant/defendant against the decision of the learned sessions court judge, Ipoh who had on 28 November 2001 found the appellant/defendant 50% liable to the respondent/plaintiff's claim in tort of negligence and 50% contributory negligence against the respondent/plaintiff and dismissed the appellant/defendant's claim against the third party.

According to the respondent/plaintiff's statement of claim against the appellant/defendant, the respondent/plaintiff had suffered personal injuries and loss arising out of a road accident which occurred on 30 June 1996 at about 3.10pm at/along Jalan Fair Park, Ipoh, involving motorvan No WR 5906 which was allegedly driven negligently by the appellant/defendant and collided into the respondent/plaintiff who was a pedestrian on the same side of the road.

[2] However, before the trial commenced, the appellant/defendant had obtained leave to include the driver of motorcar No ACN 3772 as a third party. The defendant's third party notice against the third party is to claim for indemnity and contribution, in the event the defendant is found to be liable to the plaintiff's claim (see *Mat Abu bin Man v Medical Superintendant General Hospital Taiping, Perak & Ors* [1989] 1 MLJ 226 at p 228). The appellant/defendant had alleged in the statement of claim against the third party that the accident was caused wholly or partly by the negligent driving of the third party (who was travelling from the opposite direction along Jalan Ghazali Jawi towards the direction of Jalan Hospital (as per the sketch plan exh P4) whereby the third party had collided into the plaintiff which caused the plaintiff to flung towards the direction of the defendant. However, by the statement of defence, the third party has pleaded, inter alia, that the accident was caused by the negligent driving of the defendant who knocked into the plaintiff who was on the correct side of the road and has pleaded particulars of negligence against the defendant. It is important to mention some of the particulars of negligence pleaded by the third party in his statement of defence against the defendant which is material for the purpose of this appeal and for easy reference, namely:

(j) gagal memberi laluan kepada plaintif;

(k) *gagal memerhatikan amaran/isyarat yang diberikan oleh plaintif*;

(l) gagal menentukan sama ada keadaan terselamat semasa atau sebelum menyeberangi di jalanraya/lebuhraya;

(m) gagal menjaga keselamatan diri sendiri semasa berada di jalanraya;

(n) memandu tanpa mengendahkan kenderaan-kenderaan yang melalui jalanraya/lebuhraya;

(o) memasuki atau mencerobohi jalan yang bagi kenderaan pihak ketiga;

(p) tiba-tiba tanpa memberi amaran/isyarat memasuki jalan yang sah pihak ketiga;

(q) melintas/menyeberangi jalanraya/lebuhraya dalam keadaan yang mana beliau tahu/atau mengetahui merbahaya;

(r) melintas/menyeberangi jalanraya/lebuhraya secara melulu dan merbahaya

(s) gagal mematuhi peraturan jalanraya/lalulintas.

(Emphasis added.)

[3] The appellant/defendant had testified that the third party had earlier knocked into the plaintiff who was crossing the road from A to C (as per the sketch plan exh P4) and this impact had caused the respondent/plaintiff to flung onto the direction and the path of the appellant/defendant who was travelling from the other side of the road (opposite direction) towards the direction of Jalan Ghazali Jawi (from the top to the bottom) (as per the sketch plan exh P4). Whereas, the plaintiff has testified that he was walking on the right side of the road towards the direction of the hospital (from the top to the bottom as per the sketch plan exh P4). The third party did not testify and elected to submit 'No Case To Answer'. However, the learned sessions court judge who did not accept both the versions of the plaintiff and the defendant found the plaintiff was crossing the road when he was knocked by the defendant.

[4] The learned sessions court judge found the appellant/defendant 50% liable and the respondent/plaintiff had contributed 50% to the accident and dismissed the appellant/defendant's claim against the third party with costs. The reason given by the learned sessions court judge for dismissing the appellant/defendant's claim against the third party was that the third party was not involved in the accident where the plaintiff had suffered injuries. Hence, this appeal by the appellant/defendant is against the whole of the decision of the learned sessions court judge.

[5] The appellant/defendant is also dissatisfied with the award of damages to the respondent/plaintiff, namely, RM153,600 awarded as loss of earnings at RM800 per month for 16 years on the grounds that it was gained through illegal earnings and has appealed against this award.

[6] Based on 100% liability, the learned sessions court judge awarded damages to the respondent/plaintiff as follows:

(1) *General damages (for pain and suffering)*: RM150,000 with interest at 8% per annum from the date of service of the summons on 21 October 1996 till the date of judgment on 28 November 2001.

(2) *Special Damages*

(i) RM14,000 for transport expenses with an interest at 4% per annum from the date of accident on 30 June 1996 till the date of judgment on 28 November 2001 — RM14,000;

(ii) RM580 as cost of relevant documents with interest at 4% per annum from the date of accident on 30 June 1996 till date of judgment on 28 November 2001 — RM580;

(iii) RM310 towards cost of medical treatment with 4% interest from the date of accident on 30 June 1996 till the date of judgment on 28 November 2001 — RM310;

(iv) RM21,600 towards cost of pampers with interest at 4% per annum from the date of accident on 30 June 1996 till the date of judgment on 28 November 2001 — RM21,600;

(v) loss of income at RM800 per month for 16 years — RM153,600;

(vi) nursing care — RM60,000;

(vii) costs of the action — RM18,036;

(viii) interest at 8% per annum from the date of judgment 28 November 2001 till date of satisfaction of the judgement sum.

[7] In this appeal, (1) the appellant, (2) the first respondent and (3) the second respondent will be referred to as the (1) defendant (the driver of motor van No WR 5906), (2) the plaintiff (a pedestrian) and (3) the third party (the driver of motorcar No ACN 3772) respectively.

[8] The defendant had originally appealed against the award of general and special damages. However, during the hearing of this appeal, learned counsel for the defendant had informed this court that the defendant is only proceeding against the award for loss of future earnings (RM800 per month for 16 years amounting to RM153,600) on the ground that the alleged income was gained through illegal earnings. Accordingly, this appeal on quantum is only against the award of RM153,600 for the loss of future earnings.

[9] For the sake of easy reference and convenience, this court has summarised the chronology of events from the time the summons was filed at the Sessions Court Ipoh, in the year 1996, till the appeal was heard by this court and the decision which was delivered by this court.

No.	Date	Particular
1.	8 October 1996	Summons dated 5 October 1996 with the statement of claim was filed at the Session Court Ipoh.

2.	27 November 1996	Case fixed for mention at the Sessions Court Ipoh and adjourned to 26 February 1997.
3.	26 February 1997	Case was called up for mention and adjourned to 3 April 1997.
4.	3 April 1997	Case called up for mention and adjourned to 14 May 1997.
5.	14 May 1997	Case called up for mention and adjourned to 18 June 1997.
6.	13 June 1997	Statement of defence dated 13 June 1997 was filed at the Sessions Court Ipoh.
7.	18 June 1997	Case called up for mention and adjourned to 9 July 1997.
8.	27 June 1997	Plaintiff's bundle of documents was filed at the Sessions Court Ipoh.
9.	9 July 1997	Case called up for mention and a date for hearing was fixed on 4 March 1998.
10.	28 February 1998	Application for leave to issue a third party notice dated 28 February 1998 by the defendant was filed at the Sessions Court Ipoh.
11.	4 March 1998	Hearing of the trial was called and adjourned to 15 April 1998 at the request of defendant's counsel to file third party notice.
12.	15 April 1998	Hearing of the trial was called up and also the hearing of an application by the defendant's solicitors for third party notice to be issued against the third party. Order in terms was granted on the said application and the case was adjourned to 19 May 1998 for hearing to record the evidence of the plaintiff, an Indonesian.
13.	5 May 1998	Third party notice dated 5 May 1998 by the defendant was filed at the Sessions Court Ipoh.
14.	7 May 1998	Notice of application by the defendant dated 7 May 1998 for security of costs was filed.
15.	18 May 1998	Statement of defence of third party dated 15 May 1998 was filed at the Sessions Court Ipoh.
16.	19 May 1998	Hearing of the trial was called up and also the hearing of an application for security for costs as filed by the defendant's solicitors as the plaintiff is an Indonesian and is domiciled in Indonesia. Order in terms was given on the said application. The court had also ordered the plaintiff's evidence to be recorded and then to be adjourned until the plaintiff has paid the sum of RM7,000 as ordered towards security for costs.
17.	19 May 1998	Order of the sessions court judge for the plaintiff to provide security for costs in the sum of RM7,000 on the application of the defendant.

18.	19 May 1998	Trial was heard before the *first sessions court judge* (now judge of the Court of Appeal). Upon completion of recording the plaintiff's evidence (PW1), case was adjourned to 20 May 1998 for the evidence of the plaintiff's father.
19.	20 May 1998	Upon recording the evidence of the plaintiff's father (PW2), case was adjourned to 27 August 1998 for continued hearing.
20.	27 August 1998	The continued hearing was adjourned to 13 January 1999 as sessions court judge was on leave.
21.	13 January 1999	Continued hearing proceeded with PW3 before the *second sessions court judge* (now Chairman of Industrial Court) who heard the evidence of the assistant investigation officer (PW3) and was adjourned to 18 March 1999 for continued hearing.
22.	18 March 1999	Continued hearing proceeded with the evidence of the plaintiff's employer (PW4) the last witness for the plaintiff. Case also proceeded with the evidence of the defendant's witness — immigration officer (DW1) and was adjourned to 1 July 1999 for continued hearing.
23.	1 July 1999	Case proceeded with the evidence of the defendant's second witness — an immigration officer (DW2).
24.	16 September 1999	Continued hearing was adjourned to 2 November 1999 at the request of the defendant's counsel.
25.	2 November 1999	Continued hearing was adjourned by the court to 4 January 2000 as there was another continued hearing of a criminal trial.
26.	4 January 2000	Continued hearing was adjourned to 9 March 2000 at the request of the defendant's counsel.
27.	9 March 2000	Continued hearing proceeded with the evidence of the defendant (DW3) until completion and was adjourned to 23 May 2000 for continued hearing.
28.	23 May 2000	Continued hearing was adjourned to 26 July 2000 as the sessions court judge was away in Kuala Lumpur to attend a course.
29.	26 July 2000	Continued hearing was adjourned to 29 September 2000.
30.	29 September 2000	Continued hearing was adjourned to 1 December 2000 as there was no electricity supply.
31.	1 December 2000	Case was adjourned to 22 December 2000 for the third party's solicitors to file written submission.
32.	22 December 2000	Case was adjourned to 16 January 2001 at the request of the third party's solicitor.
33.	16 January 2001	Case was adjourned to 6 February 2001 as the sessions court judge was in Pahang for a meeting.

34.	6 February 2001	Case was adjourned to 27 February 2001 for the defendant's solicitor to file written submission.
35.	27 February 2001	Case adjourned to 30 March 2001 at the request of counsel for the defendant to file further written submission.
36.	30 March 2001	Case was adjourned to 20 April 2001 at the request of the defendant's solicitors to file written submission.
37.	20 April 2001	Case was adjourned to 18 May 2001 at the request of the plaintiff's solicitors to file written submission.
38.	18 May 2001	Case was adjourned to 8 June 2001 at the request of the plaintiff's solicitors to file written submission.
39.	8 June 2001	Case was adjourned to 10 July 2001 at the request of the third party's solicitors to file written submission.
40.	10 July 2001	Case was adjourned to 15 August 2001 at the request of the plaintiff's solicitor to file written submission.
41.	15 August 2001	Case was adjourned to 6 September 2001 at the request of the plaintiff's solicitors to file written submission.
42.	6 September 2001	Case was called up before the *third sessions court judge* (now judge of the High Court) and was adjourned to 13 September 2001 to enable the plaintiff's solicitors to file written submission.
43.	13 September 2001	Case was adjourned to 28 September 2001 for the defendant's counsel to file reply submission.
44.	28 September 2001	Case was adjourned to 19 October 2001 at the request of the defendant's counsel to file reply to the submission.
45.	19 October 2001	Case was adjourned to 2 November 2001 at the request of the defendant's counsel to file reply to the submission.
46.	2 November 2001	Case was fixed for decision to 28 November 2001.
47.	28 November 2001	*Decision was delivered by the third sessions court judge.*
48.	7 December 2001	Notice of appeal was filed at the Sessions Court Ipoh by the defendant's solicitors.
49.	15 February 2002	Since the filing of the record of appeal at the High Court Ipoh case was fixed for hearing before two other judges of the High Court Ipoh since 28 May 2002 and was adjourned for various reasons.
50.	5 March 2004	Additional record of appeal was filed at the High Court Ipoh.

51.	5 January 2006	The appeal was first heard on 5 January 2006 before this court and adjourned to 15 March 2006 for continued hearing of the appeal. After several adjournments, and to trace if the plaintiff was still alive as he had returned to Indonesia, the hearing of the appeal continued on 4 October 2007 and set for clarification on 22 November 2007. The appeal which was fixed for decision on 24 January 2008 was adjourned to 25 February 2008.
52.	25 February 2008	Decision of this court on appeal.

[10] Having gone through the notes of evidence recorded by the two sessions court judges, the grounds of judgment given by the third succeeding sessions court judge, the relevant documents as contained in the records of appeal (encl 6), additional record of appeal (encl 14), vols 1 and 2 of *ikatan dokumen-dokumen plaintif*, the submissions and the authorities submitted by learned counsel for the plaintiff, the defendant and the third party, the decision of this court is as follows.

LIABILITY

[11] On the facts and circumstances in the instant case, this court finds that this is an appropriate case which justified appellate intervention for the reasons which will become apparent and contained in this judgment against the findings of the learned sessions court judge on liability who did not hear or see the witnesses giving evidence. Therefore, this court in its appellate jurisdiction is in a good position as the third sessions court judge who made the findings on liability. As stated above, the learned sessions court judge who decided this case at the lower court did not hear or see the witnesses' testimony at the trial but merely based his findings on reading of the notes of evidence recorded and heard by his two predecessors, the sessions court judges and the written submissions. The first sessions court judge heard two witnesses, the plaintiff (PW1) and his father (PW2), the second sessions court judge heard the remaining two witnesses for the plaintiff (PW3) and another witness (PW4) for the plaintiff and the defendant (DW3) and the defendant's witnesses (DW1) and (DW2). The third sessions court judge who delivered the decision had read the notes of evidence recorded by his two predecessors and the written submissions and made his findings.

[12] This court is of the respectful view that the conclusion arrived against liability by the third sessions court judge ('sessions court judge') is grossly against the weight of the evidence recorded by his two predecessors and the pleadings. The findings of the learned sessions court judge as stated in his

grounds of judgment are, with respect, not consistent, conflicting and grossly against the weight of the evidence and pleadings. In his grounds of judgment, the learned sessions court judge has stated as follows:

(i) plaintiff tidak tahu bagaimana kemalangan itu berlaku secara positif;

(ii) semasa kemalangan plaintif sedang melintas jalan. Jika *beliau berjalan di sebelah kiri jalan* tiada sebab untuk defendan melanggar beliau; [emphasis by this court].

(iii) mengenai pihak ketiga, plaintif dan SP3 (IO) mengesahkan yang pihak ketiga tidak terlibat dalam kemalangan yang melibatkan plaintif dan defendan;

(iv) mahkamah berpendapat bahawa kemalangan berlaku semasa plaintif sedang melintas jalan dan beliau dilanggar oleh motokar defendan. Oleh itu atas imbangan kebarangkalian, mahkamah memutuskan bahawa plaintif dan defendan adalah sama-sama bertanggungjawab ke atas kemalangan itu;

(v) pihak ketiga pula tidak terlibat dalam kemalangan yang melibatkan plaintif itu.

[13] As the learned sessions court judge did not accept the plaintiff's version as the truth and probable version as to how the accident had occurred, accordingly, he ought to have dismissed the plaintiff's claim. The plaintiff had testified that he was walking along the *right side* of the road along Jalan Ghazali Jawi towards the direction of the hospital when the defendant's motorvan which was approaching from the opposite direction on the same side of the road had collided into him. However, in his police report (exh P1) which was lodged 10 days later on 10 July 1996, the plaintiff has stated that he was walking on the *left side* of the road. His version in the police report is as follows:

> Pada 30.6.96 jam lebih kurang 2.50pm masa itu saya balik dari kedai. Semasa sampai di Pekan Fair Park dekat kedai Magnum, saya sedang jalan di sebelah kiri jalan tiba-tiba saya telah dilanggar oleh sebuah motorvan, selepas itu saya tak sedar diri. Saya telah dimasukkan ke wad Hospital Besar Ipoh dan mendapat cedera di bahagian badan motorvan yang melanggar saya no WR 5906. Inilah saya buat laporan polis.

Whereas the defendant has testified that the plaintiff who was knocked by the third party's motorcar on the other side of the road was flunged towards his side of the road and knocked by his motorvan. In fact, there is no evidence either from the plaintiff or the defendant or the investigation by the IO (PW3) that the plaintiff had crossed the road on the defendant's side of the road when he was allegedly knocked by the defendant as found by the learned

sessions court judge. On the other hand, the learned sessions court judge had also found that the plaintiff was unable to positively say how the accident had occurred but however, there was no reason advanced by the plaintiff as to why he was unable to positively say how the accident had occurred. In fact, there is no evidence that the plaintiff's mental faculty was affected or there was any neurogical injury or treatment received by the plaintiff.

[14] There is also another factor which the learned sessions court judge had failed to consider, ie the police report (exh P1) which was lodged by the plaintiff on 10 July 1996, 10 days after the date of accident on 30 June 1996 which is at variance with his evidence in court on material aspect, (see *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184 at p 185). In his police report, the plaintiff has stated that he was walking along the left side of the road when he was suddenly knocked by the defendant's motor van (see sketch plan exh P4) but in his evidence in court, the plaintiff had testified that he was walking on the right side of the road as one faces the direction of the hospital which is a material contradiction. This material contradiction of the plaintiff has to be examined with the plaintiff's evidence where upon further cross examination by learned counsel for the defendant, he had testified, (see p 32F record of appeal):

S: Awak dilanggar di bahagian mana oleh m/van itu?

J: Saya kurang pasti.

The plaintiff was in fact withholding that crucial piece of evidence as to how the accident had occurred from the court to determine the truth as to how the accident had occurred where he had stated that he was unsure which part he was knocked (see p 40 of the record of appeal). The totality of plaintiff's evidence itself clearly shows that the plaintiff has failed to establish negligence against the defendant as pleaded and as required by law on the balance of probabilities. In fact, the learned sessions court judge in his grounds of judgment had said:

(i) plaintif tidak tahu bagaimana kemalangan itu berlaku secara positif;

(ii) semasa kemalangan plaintif sedang melintas jalan. Jika beliau berjalan di sebelah kiri jalan tiada sebab untuk defendan melanggar beliau;

(iii) mahkamah berpendapat bahawa kemalangan berlaku semasa plaintif sedang melintas jalan dan beliau dilanggar oleh motokar defendan. Oleh itu atas imbangan kebarangkalian, mahkamah memutuskan bahawa plaintif dan defendan adalah sama-sama bertanggungjawab ke atas kemalangan itu.

[15] However, with the view and obviously to absolve the third party of any blame, learned counsel for the third party had during cross examination of the plaintiff elicited evidence to the effect that the plaintiff's version in his police report that he was walking on the left side of the road meant from the direction of the hospital towards Jalan Ghazali Jawi. This court is unable to appreciate the plaintiff's explanation elicited during cross examination on behalf of the third party that his version in his police report, that he was walking on the left side, he was referring to the left side as one faces *from the direction of the hospital* towards Jalan Ghazali Jawi. This court, with respect, is unable to accept the explanation as a probable explanation and it is more of an afterthought, unsatisfactory and unreliable. There is no reason for the plaintiff to state or to have meant that he was walking from the direction of the hospital towards the direction of Jalan Ghazali Jawi when on the same breath, his version in court is that the defendant had collided into him when he was walking towards the direction of the hospital when the defendant who was approaching in front of him had knocked into him.

[16] As noted by this court, the explanation which was elicited from the plaintiff on behalf of the third party was with a calculated manoeuvre or invention to probably eliminate that the plaintiff was nowhere at anytime on the other side of the road ie, on the third party's side of travel. It is interesting to note that the plaintiff's counsel did not seek any clarification from the plaintiff as to what he meant when he had stated in his police report that he was walking on the left side when the defendant's motor van had collided into him. In any event, the plaintiff's repeated testimony that he was walking on the side of the road towards the direction of the hospital flies on the face of the finding of the learned sessions court judge that the plaintiff was crossing the road when he was knocked by the defendant's motor van. Unfortunately for the third party and on the contrary, the IO (PW3) has testified that his investigation has disclosed that the plaintiff was crossing the road from Jalan Sri Kepayang at point A to the right (see sketch plan exh P4) which is on the third party's side of the road. The IO (PW3) had testified that: *pejalan kaki sedang melintas jalan dari Jalan Seri Kepayang ke kanan, tak pasti pejalan kaki itu sama ada telah berjaya melintas jalan A–C* (which is on the third party's side of the road). This crucial piece of evidence virtually had destroyed the entire explanation given by the plaintiff during cross examination by learned counsel for the third party. In fact, the IO (PW3) who is the plaintiff's witness had further testified that the accident could not have happened if the plaintiff had not crossed the road ie (*from Jalan Sri Kepayang*) which is on the third party's side of the road and nowhere the IO (PW3) has testified or is there evidence that the plaintiff was crossing the road on the defendant's side of the road or into the path of the defendant when the accident occurred. Further, under cross examination by learned counsel for the defendant, the plaintiff had testified as follows:

S: Keterangan awak di mahkamah hari ini (19.5.98) yang menyatakan awak sedang pergi ke kedai semula adalah berlainan dari kandungan laporan polis?

J: J: Setuju

S: Q: Ada percanggahan yang banyak antara keterangan awak dalam laporan polis awak?

J: J: Setuju

On this aspect which is crucial to determine the probable versions as to the truth and whether the plaintiff's version in his police report and his version in court is inconsistent, the explanation by the plaintiff under cross examination by learned counsel for the third party of his version in his police report has in fact opened to more inconsistencies. On the other hand, the defendant's evidence in court which is supported by his police report (exh D12) and the evidence of the IO (PW3) that the plaintiff was crossing the road from Jalan Sri Kepayang when read cumulatively together with the silent evidence (the sketch plan and photographs), the defendant's version is not only inherently more probable but is a reasonable inference to be drawn as to how the accident had occurred on the set of facts. Accordingly, the plaintiff's claim ought to have been dismissed as the learned sessions court judge himself had not accepted the plaintiff's version as to the truth or the probable version as to how the accident had occurred.

[17] In a negligence suit, particularly, in a running down case, there are usually two matters for consideration by the trial court, first, relating to negligence against the defendant and the other, contributory negligence against the plaintiff. Negligence is the breach of duty of taking care against the harmful result of one's action and to refrain from unreasonable kind of conduct. On the other hand, the doctrine of contributory negligence rests upon the view that though a defendant has in fact been negligent, yet the plaintiff by his own carelessness had also contributed to the accident which has occurred. Accordingly, the defendant's negligence alone is not the true proximate cause of the injury. In other words, contributory negligence imposes in not taking action to avoid the consequence arising from the negligence of some other person, when there is means and opportunities afforded to do so (see *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403). The law takes into consideration the act or conduct of the party injured or wronged which may have indirectly contributed to that result (see s 12(1) of the Civil Law Act 1956). On the other hand, a party who has by own negligence contributed wholly to the injury of which he complaints or claims may not be able to successfully maintain an action against another in respect of it, especially when he is considered to be the author of its own wrong in the eye of law as in the instant case. The burden of proof lies upon a party

who affirms a fact rather than upon a party who denies it (see *Moni Kant Tiwari v Baburam Dixit* AIR 1978 All 144; *Ng Chul Sia v Maimon bte Ali* [1983] 1 MLJ 110 at p 111).

[18] The 'evidential burden' is often referred to as the 'burden of adducing' evidence. It impose upon a party to adduce sufficient evidence of a fact in order to justify a finding of that fact in his favour. The evidential burden is said to be discharged when there is sufficient evidence to justify a favourable finding by the trier of fact. It is only when a party discharges the evidential burden in relation to a particular fact, namely, negligence as in the instant case, his adversary will be obliged to adduce counter evidence for the trier of fact to consider and if convinced to find in his favour. If the adversary elects not to adduce the counter evidence, he runs the risk of the trier of fact finding on that issue in favour of the adversary (see speech of Lord Goddard CJ in *R v Matheson* [1958] 1 WLR 474 at p 478).

[19] The expression 'burden of proof' is referred in s 101 of the Evidence Act 1950 which states:

(1) Whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The principles in s 101 of the Evidence Act 1950 is that, a party who wishes the court to believe in its existence of a fact as pleaded and to deliver a decision on the basis of the pleadings, he or she has to prove that facts as pleaded. In *Robins v National Trust Co Ltd* [1927] AC 515 at p 520 (PC), Viscount Dunedin said:

> Onus is always on a person who asserts a proposition or a fact which is not self evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self evident that he had been born. But to assert that he was born on a certain date, if the date is material requires proof: the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal will often find that onus is sometimes on the side of one contending party, sometimes on the side of the other, or, as it often expressed, that in certain circumstances onus shifts.

[20] In other words, the burden of proof lies on the person who has to prove a fact and it never shifts although the onus of proof shifts and such a shifting of onus is a continuing process in the evaluation of evidence (see

Raghavamma v Chenchamma AIR 1964 SC 136; *Ranchod Bhai @ Somabhai v Babu Bhai* AIR 1982 Guj 308 at p 310).

[21] In *Ng Chul Sia v Maimon bt Ali* [1983] 1 MLJ 110, Hashim Yeop Sani J (as he then was) said at p 110:

> In an action for negligence the onus of proving the allegation of negligence rests on the person who makes it unless there are disclosed facts which raise a presumption in favour of the plaintiff. *The plaintiff must show affirmatively that there has been a breach of a specific or general duty by the defendant and this resulted in the damage to the plaintiff. If he fails to prove this the action must fail.*
>
> It was contended by counsel for the respondent that the appellant should have pleaded inevitable accident if he maintained that the motorcycle skidded and knocked into his car. But the law on this is clear. *When an accidental harm is done it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person.*
>
> Applying the law to the facts of this case, the magistrate's finding that the appellant was 100% liable against the deceased pillion rider cannot be sustained.
>
> The appeal was accordingly allowed. Costs to rthe espondent.
>
> (Emphasis added.)

[22] In fact, burden of proof has two distinct meanings, namely:

(i) the burden of proof as a matter of law and pleadings, and

(ii) burden of proof as a matter of adducing evidence.

Section 101 of the Evidence Act 1950 deals with the former and s 102 of the Evidence Act 1950 deals with the latter. The first remains constant, but the second may shift. In the instant case, on the claim of negligence against the defendant, the burden of proof lies on the plaintiff. It is only if the plaintiff's evidence is found to be acceptable or is inherently probable, the onus shifts to the defendant to show circumstances if any, as to how the accident had occurred in order to rebut the assertions of the plaintiff. In ascertaining which party is asserting the affirmative, the court looks to the substance or the substantive fact and not just mere words or by a mechanical application of the principle of law.

[23] In *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291, Neal J at p 292 said as follows:

> The onus of proving negligence on the part of the defendant was on the plaintiff, and the plaintiff failed to discharge the onus either by her own evidence or by cross-examination of the defendant or by admissions made by the defendant. *I am*

therefore forced with regret to dismiss her claim. I have said 'with regret' because I feel that had the plaintiff given the correct version, whilst she may have been found guilty of contributory negligence, she might have succeeded to some extent. (Emphasis added.)

[24] In *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26, the Federal Court at pp 26–27 summarised the version as to how the accident had occurred and said:

> On 7 October 1963 the plaintiff was a passenger on the back carrier of an adult bicycle ridden by her nephew, a boy of about 10. It came out of a side-road, across the path of a motorcar proceeding along the highway from Malacca towards Machang Bharu. In the resulting collision the plaintiff sustained a fracture of her right femur.
>
> Both in her statement of claim and repeatedly in her evidence she stated that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road when it did so. This allegation was denied by the defendants who averred that the bicycle came out without stopping at the junction, and the negligence was all on the part of the juvenile cyclist. In her reply the plaintiff still reiterated that she was standing on the edge of the road when she was run down.
>
> The learned trial judge did not consider her evidence reliable or credible. He preferred to believe the defendants and found as a fact that the young cyclist never stopped at the junction but crossed the road even after he had seen the approaching car. In the result he found that the negligence of the cyclist was the sole cause of the accident and the defendant driver was in no way to blame. The claim was accordingly dismissed.
>
> The appellant's complaints against the decision rest on the very ground which the judge had found as a fact against her. The contention is still maintained by counsel that she was 'standing on the grass verge after having alighted from the bicycle' when she was hit by the motorcar. On this ground it is argued that the defendant driver was solely negligent and that the learned trial judge should have so found against him.

I think it is necessary in this case to emphasis once again that the courts should give their decisions in strict accordance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co Ltd v Southport Corporation* [1956] 2 WLR 81, at p 91:

> If an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they have to play in our trial system.
>
> The statement of claim alleged against defendant driver total negligence — it was either that or nothing. That the judge was not invited to consider the question of contributory negligence at all may clearly be seen in the arguments of counsel at the trial. The grounds of appeal now before this court likewise eschews that issue altogether.
>
> The sole issue we have to decide, therefore, is whether or not we ought to reverse the trial judge's finding of fact. Lord Diplock in *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49 said:

> In this kind of case it is very rarely that an appellate court is justified in reversing the decision of the trial judge who has had the opportunity of seeing and hearing the witnesses and who has directed himself correctly...

Is there anything in this case which would justify us in substituting our own view of the facts for that of the trial judge?

For one thing, it is manifest that he rejected altogether the very basis of the appellant's claim — that she was an innocent bystander standing still on a spot not permitted for the passage of any vehicular traffic when she was knocked down. Since her case was put that way, and that way only, the trial judge was, of course, not at liberty to speculate where she was if, *in truth, she was not on the grass*. The issue before him required only a plain 'yes' or 'no', to which he gave his answer. In his view 'the bicycle must have travelled across nearly half the road' to cause the accident. Accordingly he held the defendant not negligent in all the circumstances.

We are also of the opinion that the appellant was nowhere near or on the grass when the collision took place. If she was not, the ground must fall away completely from under her feet. *It is not open to this court to try and make out a case for her which she never adumbrated in her own pleadings, she herself having left no option for the trial judge, or this court, to treat the issue of contributory negligence as open.*

Accordingly this appeal is dismissed with costs.

(Emphasis added.)

[25] In the instant case, as to the defendant's version in court, as to how the accident had occurred, the learned sessions court judge had failed to consider his evidence (DW3) where he had testified: (as translated)

> As he was driving his motor van slowly, suddenly the plaintiff who was knocked by another vehicle (the third party) was thrown towards his direction. He applied the brake but still knocked the plaintiff who was thrown onto his direction. The person whom he had knocked was the pedestrian, who had crossed the road i.e. the pedestrian who crossed the road from the opposite side of the road and thrown toward his side of the road. He was travelling from the top towards the bottom as per the sketch plan (exh P4) and the plaintiff (pedestrian) was crossing from the left A towards the right D as per the sketch plan) (exh P4); when initially he was knocked by the third party motorcar.

The evidence as per verbatim of the defendant is as follows:

> Saya memandu perlahan, tiba-tiba seseorang telah dilanggar oleh kenderaan lain dan telah terpelanting ke arah saya. Saya menekan brek tapi saya terlanggar juga orang yang terpelanting itu. Orang yang kena langgar itu adalah seorang pejalan kaki yang melintas jalan. Si pejalan kaki ini melintas dari jalan sebelah jalan ke arah jalan saya. P4 dirujuk. Saya dari atas ke bawah P4. Pejalan kaki itu lintas dari sebelah kiri ke kanan ('A–D') dalam P4.

[26] In his police report which was lodged on the same day, the defendant has stated as follows:

> Lebih kurang jam 3.10pm 30.6.96 semasa saya memandu motor van WR 5906 dari Ipoh menghala ke Bercham melalui Jln Fair Park Ipoh apabila sampai depan Magnum tiba-tiba sebuah motokar no ACN 3772 yang datang dari arah stadium telah terlanggar pejalan kaki dan pejalan kaki tersebut telah terpelanting ke hadapan m/van saya dan saya cuba brek tetapi terlanggar juga. M/van saya rosak teruk di bahagian hadapan kerugian belum pasti. Dan saya datang keBalai Trafik buat lapuran.

[27] It is important to consider that the evidence of the defendant in court is supported by his police report (exh D12) which was lodged on the same day of the accident on 30 June 1996 at 4.35pm. The defendant's evidence which is supported by his police report (exh D12) at p 99 of the record of appeal (encl 6) does not seemed to have been given any weight by the learned sessions court judge in arriving at his decision and neither is it reflected in his grounds of judgment.

[28] In *Noorianti bt Zainal Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242; Lim Beng Choon J at p 243 said:

> It is useful to pause here for a moment to say a few words regarding the approach which a trial judge should adopt in evaluating the evidence adduced at a trial. It has been stated in numerous cases that the fact that the evidence given by the witnesses of one party was unshaken or unbroken is not per se an all sufficient acid test of credibility and that the inherent probability or improbability of the fact in issue must be the prime consideration — see for instance *Muniandy & Ors v PP* [1966] 1 MLJ 257, *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 and *PP v Neoh Wan Kee* [1985] 1 MLJ 368 at p 372. It has also been said that a trial judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable — see for instance *Koay Teik Choo & Ors v Reg* [1956] MLJ 52.

[29] The learned sessions court judge with respect, had misdirected himself in law and on the facts where:

(i) he made a finding that the damage to the defendant's motor van as shown in the photograph (exh P5C) shows that the defendant was driving at a fast speed prior to the accident which has caused the plaintiff to suffer serious injury whereby there is no such evidence to draw such an inference. Furthermore, the learned sessions court judge with respect, had failed to consider that the version as given by the defendant that the plaintiff who was crossing the road from the other side of the road (A–C) was thrown onto his path after he was knocked

by another vehicle could possibly have also caused the serious nature of the injuries as suffered by the plaintiff. He had not considered whether that version is in fact, inherently more probable when considering the totality of the evidence and the nature of injuries coupled with the evidence of the IO (PW3).

(ii) The learned sessions court judge with respect, had failed to critically examine and evaluate the evidence of both the versions of the plaintiff and the defendant together with the silent evidence in its proper perspective and correctly. In other words, there was absolutely no proper judicial evaluation of the totality of the evidence but regretfully, a finding which was short circuited or done on a selective basis of the evidence and with respect, in a mechanical fashion.

(iii) The learned sessions court judge with respect, had misdirected himself by having given undue weight to the evidence of the investigating officer (PW3) as a determining factor and conclusive that the third party's motorcar was not involved in the accident between the plaintiff as *first, PW3* did not witness the accident, *secondly*, PW3 came to scene only after the accident had occurred; and *thirdly* PW3 was relying only on the version given to him by the third party driver (an interested witness) who had never testified in court. On the other hand, the learned sessions court judge had failed to place sufficient importance and significance in his findings, as a decisive consideration that the plaintiff had testified that he did not know positively how the accident had occurred. The learned sessions court judge had instead, seemed to have merely provided lip service on this aspect of the evidence. When the evidence of interested witnesses is examined, it is well established that their evidence has to be tested in the light of the probabilities and the surrounding circumstances (see *State of Punjab And Gurmej Singh v Jit Singh & Ors* AIR 1994 SC 594).

(iv) The learned sessions court judge had misdirected himself when he held that the glass fragments were *on the centre* of the road as shown in the sketch plan (exh P4) marked 'F' where in fact, it is shown in the sketch plan (P4) that the glass fragment are found *on the defendants correct side of the road* and this evidence is confirmed by (PW3), the investigating Officer (PW3) at p 49 rekod rayuan (encl 6) that the glass fragment are found on the defendant's side of the road and not on the centre of the road where PW3 has stated 'kaca dijumpai dalam jalan motor van' which is the defendant's side of the road.

(v) On the facts and circumstances in the instant case, the learned sessions court judge had failed to consider and evaluate judiciously the position of the defendant's motor van after the accident as shown in the sketch plan (exh P4) with the defendant's evidence in court and his police report (exh D12) which was lodged on the same day at 4.35pm soon

after the accident which occurred at about 3.10pm which supports the defendant's version. It is important to state at this stage that the dicta in the case of *Yeoh Cheng Han v Official Administrator, Malaya* [1972] 2 MLJ 7 at p 9 with respect, is not a general or blanket application to all road accident cases as it all depends on the facts of each case, where it is stated:

> the position of the vehicle after the accident can afford absolutely no proof as to their respective position of the immediately before or at the moment of collision,unless there is the clearest evidence to show that the vehicles involved in the accident stop dead upon impact' (see *Foong Nan v Sagadevan* [1971] 2 MLJ 24 at p 25).

In the instant case, there is no evidence that the position of the defendant's motor van after the accident as shown in the sketch plan is not the place where the motor van had stopped after the accident. In any event, the position of the defendant's motor van as shown in the sketch plan (exh P4) when compared with the photograph (exh P2–H) is misleading although it does not change or affect the version of the defendant as to how the accident had occurred.

[30] Accordingly, the learned sessions court judge ought to have found that the reasonable inference that ought to be drawn on the totality of the evidence is that, the defendant's version is inherently more probable that the plaintiff was suddenly thrown onto his motor van after the third party motorcar had collided into him and this is further strengthened and supported by the damage to the defendant's motor van and the windscreen and the nature of the plaintiff's injuries. It is also important to consider that there is no obvious damage to the front body of the defendant's motor van except for the dent but mainly to the windscreen which is all more probable and consistent with the defendant's version that the plaintiff was thrown from the opposite side (the other side of the road) towards the correct side of his travel after the third party motorcar had knocked into the plaintiff and this probably must have happened when the plaintiff was crossing the road on the third party's side of the road as testified by the IO (PW3) ie, from A–C. The IO (PW3) had testified (see p 49 of the record of appeal) (encl 6) that the plaintiff was crossing the road from Jalan Sri Kepayang towards the right. In other words, PW3 had testified that the plaintiff was crossing the road from side A towards C as per the sketch plan (exh P4), ie on the third party's side of the road which is consistent with the defendant's version of how the accident had occurred. This version is also supported by the damage to the third party's motorcar at the right side of the motorcar (see original photographs). PW3 had also testified that he was not sure whether the third party's motorcar had knocked the plaintiff and that he was also not sure whether the third party driver of motorcar No ACN 3772 had lost control.

The evidence of PW3 under cross examination by learned counsel for the defendant at pp 49–50 in the appeal record is as follows:

> Arah perjalanan motokar No ACN 3772 dari Jalan Ghazali Jawi ke arah hospital ie, dari bawah P4 ke atas P4. Motor van dari Jalan Hospital ke Jalan Ghazali Jawi (atas ke bawah). Pejalan kaki sedang melintas jalan dari Jalan Sri Kepayang ke kanan. 'F' serpihan kaca dari motor van WR 5906. Kaca dijumpai dalam jalan motor van. Tiada jumpai kesan darah. Tiada kesan calar, jalan itu lebar. Kerosakan motor van (P5) — tak pasti ada kerosakan sedikit di tepi pintu motor van. Tak pasti sama ada bumbung motor van rosak.
>
> *Dalam siasatan saya, saya tak pasti kereta ACN 3772 sama ada melanggar plaintif.*
>
> Dalam kes ACN 3772 di kompaun di bawah Rule 10 kerana melanggar kereta parking. Tiada tindakan ke atas motor van. Dalam kes ini (IP) ini ada dua report sahaja. *Tak pasti sama ada motokar ACN 3772 hilang kawalan.*

[31] However, later on under cross examination by learned counsel for the third party, PW3 had changed his evidence by stating that the third party driver did not collide into a human being but at the same time, there is evidence that PW3 has stated that he was not sure whether the plaintiff had succeeded in crossing the road from A–C as per the sketch plan (which is on the side of travel of the third party) which confirms the defendant's version that the plaintiff was knocked by another vehicle at the opposite side, ie, from A–C and he was then thrown into the path of the defendant's direction. PW3 had also testified that the plaintiff had crossed the road from Jalan Seri Kepayang towards the right and that if the plaintiff did not cross the road, the accident would not have occurred which surely tends to show the factual situation as happened in the instant case and as per the defendant's version in his police report and his evidence in court. The plaintiff's version in his evidence in court and as stated in his police report is itself conflicting and doubtful as to which side of the road he was walking. In any event, both the versions of the plaintiff are not probable when considering the totality of the evidence and the fact that he has admitted that he does not know on which side he was knocked.

[32] The learned sessions court judge having said in his grounds of judgement that the IO (PW3) has testified that *tidak pasti sama ada motokar pihak ketiga melanggar plaintiff* but later on he has taken into consideration where he has stated *namun begitu semasa soal balas oleh peguam bagi pihak ketiga beliau mengesahkan motokar pihak ketiga tidak melanggar manusia.* It is important to consider at this stage that PW3 will not be in a position to confirm whether the third party's motorcar had knocked into the plaintiff or not, as PW3 was not present at the time of the collision and did not witness the accident and his evidence on this aspect seemed to have been dependant solely on what the third party driver had told him. Therefore, the evidence of PW3 on this aspect of the alleged non-involvement of the third party's

motorcar cannot be given any weight. On the other hand, the learned sessions court judge who did not hear or see the defendant giving evidence did not give any reasons at all why the defendant's version of the accident which is supported by his police report (D12) and the silent evidence (sketch plan) (P4) and considering the evidence of the IO (PW3) that his investigation had disclosed that the plaintiff had crossed the road from Jalan Sri Kepayang, the side lane which is on the third party's left side of the road was not acceptable or given any weight as the probable version as to how the accident had occurred and consequently which resulted in the plaintiff's injury (see *Lim Gaw Teong & Anor v Daniel & Anor* [1968] 1 MLJ 277; *Lee Thiam v Fatimah bt Salleh* [1981] 1 MLJ 285, *Anthony a/l Arokyasamy Seemon v Mohamad Zailani Abdul Rahman & Anor* [1996] MLJU 448).

[33] In the absence of any reason having been given by the learned sessions court judge for not accepting the defendant's version as the probable version for the accident and the fact that he did not hear or see the plaintiff and the defendant giving evidence, this court in its appellate jurisdiction is justified in considering the totality of the evidence as recorded with the admissible documents to determine the probable cause of how the accident had occurred and to consider from which side of the road was the plaintiff crossing the road before he was thrown into the path of the defendant's motorvan. In *Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle* [1927] AC 37, Lord Sumner said at p 47:

> The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it.

[34] As this appeal is a rehearing of the printed evidence, this court must consider the whole circumstances of the judgment. In *Balasingham v Public Prosecutor* [1959] MLJ 193, Ismail Khan J (as he then was) said at p 194: *an appeal is merely a continuation of proceeding by way of rehearing* …. In *Public Prosecutor v Ma'arif* [1969] 2 MLJ 65 Abdul Hamid J (as he then was) said: *an appeal is merely a continuation of a trial and throws open all the evidence to re-examination in order to determine whether or not the various findings of the court are correct*. In the absence of contradiction of any element of inherent improbability, the defendant's evidence ought to have been accepted. This court in its appellate jurisdiction and rehearing this appeal is satisfied that the plaintiff had failed on the balance of probabilities to establish negligence against the defendant for the court to find the defendant liable to the accident and its consequent damage (see *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286; *Ho Kiong Chan v Patipet* [1966] 1 MLJ 159 at p 163).

[35] In *Lee Hock Lai v Yeoh Wah Pein* [1999] 5 MLJ 172, His Lordship Mohd Hishamudin J at pp 175–179 said as follows: A

> With respect, the learned sessions court judge was fundamentally wrong in her approach. The case she was dealing with — a normal road accident case — essentially concerns the tort of negligence. The proper manner of approaching the case, as with all cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact (after applying the principles governing the law of negligence to the facts of the case — among which was whether there was a breach of a legal duty to take care by the defendant) as to whether or not the defendant was liable in negligence. If the court were to find that the defendant was not guilty of negligence, then it must dismiss the plaintiff's claim. And in view of the fact that in the present case there was no counterclaim by the defendant against the plaintiff for negligence, that would be the end of the matter! But if, on the other hand, she were to come to a finding that the defendant was liable in negligence, then since in the present case the defendant, in his pleading, has pleaded contributory negligence, she must also consider and make a finding of mixed law and fact (after applying the principles governing contributory negligence to the facts of the case) whether or not the plaintiff was guilty of contributory negligence. And assuming that she were to find the plaintiff guilty of contributory negligence, then the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.
>
> *With respect, from the judgment of the learned sessions court judge, it is not clear to me as to how she came to the conclusion that both parties were 'equally responsible' for the accident. In her judgment, she appears to have avoided the real question: whose act caused the wrong? In other words, she had not dealt at all with the question of causation.*
>
> With respect, to say that the glass fragments or splinters were slightly more on the defendant's side is also a perverse finding of fact. The evidence, in particular, the sketch plan, clearly shows that the glass fragments or splinters were found scattered very much more on the defendant's lane as compared to the plaintiff's lane. This is also supported by the investigating officer (PW1) who, in evidence, said:
>
> > Taburan (serpihan) kaca kebanyakan di antara 'B'–'C' dan sedikit antara 'A'– 'B'.
>
> Throughout, the burden was on the plaintiff to prove his case, that is to say, negligence on the part of the defendant, on a balance of probabilities. Upon considering the evidence in its totality, I found that the plaintiff had failed to discharge that burden.
>
> (Emphasis added.)

B C D E F G H I

[36] As the plaintiff who bears the burden of proof on the pleadings has failed to tilt the balance of probability against the defendant, there is rightfully nothing for the defendant to answer (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4). On the other hand, even if the scales of

probabilities are so evenly balanced or the trial court is unable to say whose version is inherently more probable, which is not the case in the instant appeal, the plaintiff would still fail (see *Selvaduray v Chinniah* [1939] MLJ 253). This court is mindful that discrepancy and contradiction in the evidence of a witness which are not material does not necessarily or automatically make a witness unreliable or render all his evidence incredible or to reject the whole of the evidence as it depends on the facts and circumstances of each case (see *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172; *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105; *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15; *Gulwant Singh v Abdul Khalik* [1964] MLJ 286). On the other hand, where there is a conflict of the oral evidence, the court should consider the overall probabilities of the case and particularly the silent evidence which are basically on documentary forms and neutral (see *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Llyod's Report 1, *R v Jaharjharia R Dalmia* AIR 1946 PC 178).

[37] In view of the material flaws and misdirection in the findings of the learned sessions court judge itself and the fact that he did not hear or see the witnesses giving evidence, it is an appropriate case for this court to intervene upon reading the evidence as recorded by the two sessions court judges to determine this appeal. In fact, there is also a material error in the judgement which was approved by the court and extracted (see p 10 of the record of appeal tambahan (lampiran 14)) where it is stated that, the learned sessions court judge is purported to have heard the evidence of the parties where it is stated in verbatim:

> … setelah mendengar keterangan pihak-pihak seperti di sebutkan tadi.

which means that, seemingly he had heard the evidence of the parties which in fact, is not the correct position. In fact, all the three learned counsels have conceded when pointed out by this court to that part of the *judgment* (see p 10 *rekod rayuan tambahan* — encl 14) which states, the learned sessions court judge had heard the evidence as incorrect. The learned sessions court judge had only read the evidence recorded by both his predecessors, the two learned sessions court judges and the written submission filed by all the parties and did not hear or see the witnesses giving the evidence.

[38] In the instant case, the findings of the learned sessions court judge does not involve the determination of credibility and reliability or demeanour of the witnesses as he has not seen and heard the witnesses. However, the findings with respect, seemed to be based on conjecture which is not supported by evidence from any of the witnesses and is without proper evaluation of significant pieces of evidence as stated above and is indeed grossly against the weight of evidence. *First, the plaintiff had testified in court*

that, he was walking along the right side of the road along Jalan Ghazali Jawi as one faces towards the hospital when the defendant was approaching from the front of the same road had collided into him. *Secondly, the plaintiff in his police report has stated that he was walking along the left side of the road when the defendant who was approaching from the front had collided into him. Thirdly,* the plaintiff had testified *under cross examination by learned counsel for the third party that he was walking on the left side of the road from the direction of the hospital towards Jalan Ghazali Jawi*. On the other hand, the defendant's version in court is that, the plaintiff who was collided into by the third party's motorcar was flung over to his side of the road and onto his motor van and this is supported by his police report (exh D12) which was lodged on the same day. However, the third party did not come forward to give his version in order to rebut, clarify or contradict the version of the defendant even though the defendant has on the balance of probabilities established that the third party had knocked into the plaintiff. In fact, by para 4 of his statement of defence, (the third party's statement of defence) the third party had challenged the defendant to prove the particulars of negligence as pleaded in the third party notice (statement of claim) against the third party and the defendant has in fact produced evidence to establish the collision and negligence against the third party on the balance of probabilities. Unfortunately, the learned sessions court judge having rejected the plaintiff's version as to how the accident had occurred did not give any weight to the defendant's evidence in court which is supported by his police report, but instead had made a finding on a version which is, with respect, neither the version of the plaintiff nor the defendant; thereby embarking upon a course of speculation on what might have happened and the conclusion at which he had arrived appears to be matter of pure conjecture. In other words, the learned sessions court judge had found that the plaintiff was in fact not telling the truth when the plaintiff had testified in court that he was walking close to the right edge of the road as one faces towards the hospital and the defendant's motor van which came from the opposite direction on the same side of the road had allegedly collided into him. Interestingly, the version as found by the learned sessions court judge is that the defendant's motor van had collided into the plaintiff as the plaintiff was crossing the road. This findings, with respect, is without any basis, factual or legal but with respect, a version based on speculation or conjecture which is not supported by evidence from any of the witnesses at the trial. The trial court, with respect, cannot overstretch its power or discretion to find the defendant liable for the accident in order to compensate the plaintiff who himself had failed to establish negligence against the defendant on the balance of probabilities. It is desirable, in cases of negligence, as in any other area of the law, that the law should be maintained to such a measure of certainty as is consistent with the demand of justice.

A **[39]** Be that as it may, this court wish to observe that this court is faced with an unpleasant duty to disturb the finding of the learned sessions court judge who is now a judge having been elevated to the bench of the High Court. However, this court has always said and wishes to reiterate that this court would not abdicate or shirk its judicial function to meet the justice of
B the case under any circumstances but only to administer justice according to the facts and the application of the law. In fact, it is important to be reminded that it is not the function of the court to try and make out a case for the plaintiff or claimant or to attach liability even to the extent of 1% against a defendant even if the claimant or the deceased was a passenger in a motor
C vehicle unless there is a sufficient evidence to arrive at such a finding or to draw inferences on the facts and in law, otherwise the court of law would unmistakenly perform the function of tribunal of morals. This court cannot be expected to perform its judicial function of a judge if at the same time it
D try to place itself on the chair of a charitable organisation.

[40] The third party's police report which is included in the record of appeal at p 165 was not initially objected by the third party's counsel at this appeal or at anytime during the course of the submission before this court for
E this court to disregard the same. Nevertheless, on having noticed the police report during the time when this court was about to prepare its decision, this court had fixed a date to hear the parties on this matter and had brought it to the attention of all counsels to address the court as to how the third party's police report was included in the record of appeal. On the initial reading by
F this court of the third party's police report, which this court cannot pretend not to have seen of its existence or read it as it was included in the Record of Appeal, the third party had admitted of an accident having suddenly occurred in front of him and it was only after this impact, he had attempted to avoid but still collided into the parked vehicles on his side of the road. The third
G party driver had expressly stated in his police report as found at p 165 of the record of appeal of a first accident having suddenly occurred on his side of the road although he did not expressly state that he had collided into the plaintiff who was crossing the road as obviously it happened so suddenly as admitted by him.

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[41] However, as the third party police report had remained in the record of appeal without any objection having been raised by learned counsel for the third party, this court had on the date fixed for further submissions sought clarification from the counsels. This court had requested learned counsel for
I the defendant and the third party to address the court on the admissibility of the third party's police report as to whether there was any agreement to admit the same since the third party did not testify in court. It was only at this stage that both learned counsels had informed this court that learned counsel for the third party had submitted 'no case to answer' as the third party was not

called to testify in the lower court and therefore the police report of the third party ought not to be taken into consideration for the purpose of this appeal. This court was informed that it was inadvertently included in the record of appeal and was not objected by the parties due to an oversight during the hearing of this appeal when this appeal was adjourned to a date for a decision.

[42] In the circumstances and since both learned counsels had explained the position of the third party's police report which ought not to have been included in the record of appeal, this court had directed the said police report which was originally included in the record of appeal at p 135 and read by this court, to be expunged from the record of appeal and the same be disregarded and would not be taken into consideration for the purpose of this appeal. Accordingly, this court wish to make it expressly clear that the contents of the third party's police report was not taken into consideration by this court in arriving at its decision.

[43] However, it is regretful that the trial court and this court had been deprived of considering the third party's police report which was tendered in the lower court and not admitted as evidence but included in the record of appeal where this court had ordered the same to be excluded from consideration as it has not been properly tendered at the trial to establish or admit the contents of the report.

[44] This court having read and reread the notes of evidence with the supporting admitted documents, the written submissions, the grounds of judgment of the learned sessions court judge, categorily wish to state, with utmost respect, that the findings of the learned sessions court judge cannot be sustained in law and on the facts and is indeed grossly against the weight of evidence. In *Public Prosecutor v Ma'arif* [1969] 2 MLJ 65, Abdul Hamid J (later Chief Justice) at p 66 said:

> It is true that a magistrate's decision should not be reversed on the ground of its being against the weight of evidence. However, there is no reason why it should not be done if it were found that the decision was grossly against the weight of the evidence. I am of the opinion that on the evidence adduced as a whole, a person acting judicially and properly instructed as to the relevant law could not have come to the conclusion that the learned president did. I would, therefore, allow the appeal and set aside the order.

The finding of 50% liability against the defendant and 50% contribution by the plaintiff is obviously a mechanical finding which possibly had been short circuited and with respect, cannot be sustained as a proper judicial finding of fact. Law has already been set down, and the courts have to act accordingly and decide on the facts presented to the court, unmindful of the consequences of the decision as justice must be according to the law and the

law is not for the convenience of the courts or for any particular individual. Findings of fact require proper judicial evaluation of the evidence in order to arrive at a decision in accordance with reasons, law and justice and ought not to be circumvented or short circuited. Even if the facts which are proved give rise to conflicting inferences of equal degrees of probability, the choice between them would still be a matter of conjecture and the court must act only on the evidence which is before the court.

PLEADINGS

[45] It is also important to consider the 'Butir-Butir Kecuaian' in the statement of claim of the plaintiff as pleaded against the defendant especially, the following particulars, which, inter alia, are as follows, and is a contradiction of the plaintiff's version in court of how the accident had occurred:

(1) memandu ke arah jalan yang salah;

(2) gagal untuk memberi sebarang amaran yang memadai akan kedatangannya;

(3) gagal untuk melihat plaintif dalam masa yang mencukupi untuk mengelak berlanggar dengannya ataupun tidak langsung;

(4) memintas arah jalan plaintif;

(5) gagal untuk menunggu sehingga plaintif telah selamat berlalu sebelum memintas arah jalan plaintif;

(6) memasuki ke dalam arah jalan plaintif;

(7) gagal untuk memberi perhatian kepada peruntukan Kanun Jalanraya.

[46] Whereas the defendant's evidence in court together with his version in the police report (exh D12) and as pleaded in the statement of defence (although it is not drafted satisfactorily or with proper care) are consistent with how the accident had occurred. Under the particulars of negligence against the plaintiff in the statement of defence, it is stated, inter alia, as follows:

(a) gagal memerhatikan atau memberi sebarang perhatian;

(b) berjalan secara tergesa-gesa;

(c) gagal memberi sebarang amaran yang cukup kemunculannya;

(d) gagal bertimbang rasa kepada pengguna-pengguna jalanraya yang lain.

(e) gagal memberi jarak laluan yang selamat kepada motorvan No WR 5906;

(f) gagal mengamalkan perhatian sewajarnya dan dengan cermatnya mengawal dirinya semasa berada di jalanraya;

(g) mengujudkan satu situasi yang merbahaya dan dengan yang demikian meletakkan pihak defendan dalam keadaan sukar untuk mengelakkan perlangaran tersebut;

(h) gagal memerhatikan keadaan motorvan No WR5906 jalanraya/lebuhraya tersebut;

(i) gagal memberi jarak yang agak selamat kepada kenderaan-kenderaan lain di jalanraya/lebuhraya atau semasa berada di jalanraya/lebuhraya;

(j) gagal memberi laluan kepada motorvan No WR 5906;

(k) gagal menentukan sama ada keadaan terselamat semasa atau sebelum menyeberangi di jalanraya/lebuhraya;

(l) memasuki atau mencerobohi jalan yang bagi kenderaan motorvan No WR 5906;

(m) tiba-tiba tanpa memberi amaran/isyarat memasuki jalan yang sah bagi motorvan No WR 5906;

(n) melintas/menyeberangi jalanraya/lebuhraya dalam keadaan yang mana beliau tahu/atau mengetahui merbahaya;

(o) melintas/menyeberangi jalanraya/lebuhraya secara melulu dan merbahaya;

(p) gagal mematuhi peraturan jalanraya/lalulintas;

(q) gagal membuat sesuatu untuk mengelakkan perlanggaran tersebut.

[47] This court with regret finds that the plaintiff's evidence in court or his version in his police report does not support the particulars of negligence as pleaded in the plaintiff's statement of claim against the defendant as to how the accident had occurred. The pleadings seemed to have been drafted in a cavalier and mechanical fashion without actually examining or considering the actual state of facts and the truth of how the accident had occurred and wish to refer to some of the reported cases on the importance of pleadings.

[48] In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J in his judgment at pp 196–197 said:

> It was not open to the learned magistrate to fly off at a target as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v Pollard &*

Morris: 'Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course'.

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v Sakiman* [1956] MLJ 45, where Sir Charles Mathew CJ said:

> I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.
>
> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected …

[49] In *State Government Of Perak v Muniandy* [1986] 1 MLJ 490 at p 492, Hashim Yeop A Sani (as he then was) said:

> *Parties are bound by their pleadings* and we do not think that the appellant should on the admitted facts of this case be allowed to avoid vicarious liability merely on the bare fact that there was such an administrative circular relating to the prohibition. (Emphasis added.)

[50] In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, Jermuri Serjan SCJ (as he then was) delivering the judgment of the court said at pp 431–432 as follows:

> It does not seem necessary for us to emphasise and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how much lapses in the courts should be tolerated at the expense of the clients.
>
> Perhaps it would be sufficient and pertinent to repeat here in the hope that we have said the last words on this issue, what Raja Azlan Shah FJ (as he then was) said in *Chartered Bank v Yong Chan* at p 159:
>
> > In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.

And what Sharma J said in *Janagi v Ong Boon Kiat* at p 197:

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

The observation of Lord Edmund-Davies in the case of *Farrel v Secretary of State* at p 173 are equally pertinent:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it.

Lastly, on the same topic, we would adopt the observations of Lord Radcliffe in *Esso Petroleum Co Ltd v Southport Corp* at p 241 where he said:

> It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.
>
> We need only to refer three recent cases where this court had to deal with similar issues to illustrate occurrences of lapses on the part of solicitors in the preparation of their pleadings with the resultant dire consequences. We refer to the recent appeal in this court which had occasion to decide the issue whether to allow a new point raised on appeal but not pleaded and argued in the High Court. In that case the court was unanimous in its decision to refuse to allow the new point to be argued without calling for fresh evidence.

Mohamed Azmi SCJ in delivering the judgment of the court in the case of *Muniandy & Anor v Muhamad Abdul Kader & Ors* said at p 418:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 (refd) at p 233:
>
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

Again on the same page the learned judge continued:

> In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality. The so-called 'mission' is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and to the said ground tenancy, they claimed, albeit mistakenly, protection against eviction under the rent control legislation.

In yet another very recent case the same issue fell to be determined by this court. Hashim Yeop A Sani CJ (Malaya) in delivering the judgment of this court quoted *Muniandy*'s case and Mohamed Azmi SCJ's observations quoted above. At p 363 of the judgment the learned CJ said:

> The crucial issue of the application of the doctrine of severance should have been pleaded and argued before the learned judge and it would be wrong in our view to allow the alternative ground of appeal to be argued at this late stage.

All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

[51] In *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65, His Lordship Gopal Sri Ram JCA who delivered the majority judgment observed that:

> the satement of caim is less than adequate as a perfect pleading (see *Wisma Punca Emas Sdn Shd v Dr Donal R O'Holohan* [1987] 1 MLJ 393 at 397, and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152).

[52] In *Blay v Pollard and Morris* [1930] 1 KB 628 at p 634, Scrutton LJ said:

Case must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

In the circumstances, the statement of defence was of no assistance to the second defendant to raise causation as an issue to the first plaintiff's claim against the second defendant as it was raised without amending the pleadings and he was not entitled to take such a course.

[53] In *How Paik Too v Mohideen* [1968] 1 MLJ 51 at p 52 His Lordship HT Ong FJ (as he then was) for the Federal Court allowed an appeal on the ground that the High Court judge who heard the appeal from the decision of the learned magistrate decided an issue that no demand for rent had been made by the landlord on the premises and that demand on the premises was necessary before rents could be lawfully due. However, this point was not pleaded in the statement of defence. His Lordship said:

With respect, I think the decision of the learned judge was wrong. In the first place, the point was never pleaded in the defence; consequently it was not a fact in issue requiring the magistrate to make any finding thereon.

[54] In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, His Lordship Sharma J said (at p 196):

... In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

[55] In *Farrel v Secretary of State for Defence* [1980] 1 All ER 166, Lord Edmund-Davies at p 173 said:

For the primary purpose of pleadings remains and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

[56] It is settled that this court or the trial court ought not to travel outside the pleadings and the evidence produced at the trial by the parties or proceed to try and make out a case for the plaintiff in order to award damages because it sympathises with the plaintiff on his injury and disabilities but it should be confined to the pleadings and evidence. It is to be noted that 'morality and justice are not merely alien, but hostile.

[57] This court has made its observation in *Muniyandi a/l Periyan & Anor v Eric Chew Wai Keat & Anor* [2003] 3 MLJ 527 that when hearing appeals from the lower courts especially in running down cases, there seems to be a blatant disregard and lack of seriousness and least importance is given when drafting pleadings by some lawyers who seemed to be too relaxed and confident with their pleadings. It is trite law that parties are bound by their own pleadings and this has been said time and time again by the High Courts, Court of Appeal and the Federal Court that the litigants and their solicitors should give utmost importance to pleadings which are filed in court so that cases can be decided on the pleaded facts to the particular incident and parties are not taken by surprise at the trial (see *Natesan v Goh Gok Hoon* [1968] 2 MLJ 3 at p 8, *Thompson v Birkley* [1883] 47 LTR 700 and *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at p 413).

[58] The learned sessions court judge himself with respect, did not seem to have considered judicially or directed his mind to the particulars of negligence as pleaded in the statement of claim when he arrived at his decision. Had he considered the pleadings together with the defendant's version of how the accident occurred, he would have accepted the defendant's version as inherently more probable. It is the respectful view of this court that the defendant cannot be found to be 50% negligent because, as testified by the defendant, the plaintiff was initially knocked along the other side of the road (opposite side) of the defendant's right of travel and flung to his side of the road. The defendant could not therefore be expected to anticipate other drivers or road users in the instant case, the plaintiff and the third party walking or driving respectively, in a unsafe or irresponsible manner which had caused the first collision between the plaintiff and the third party's motorcar and subsequently caused the plaintiff to collide with the defendant's motor van. In *KR Taxi Service Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49, HT Ong FJ (later Chief Justice Malaya) at p 53 said:

> The degree of care that need be kept which driving along an open country road is not quite the same as that which ought to be observed in a crowded city street. Merely because drivers of motorcar and motorcycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down (see *Brophy v Shaw* The Time June 25 [1965] CLY 2677 CA; *Edwards v Noble* [1963] 1st Supplement to Bingham's All the Modern Cases on Negligence (2nd Ed) CA at p 53).

[59] Accordingly, the defendant has in the statement of defence raised the plea of inevitable accident which should have been considered by the learned sessions court judge and not brush aside but it is regretable, nothing was said of it. In fact, the version of the defendant rightfully attracts the defence of inevitable accident (see *The Virgil* [1843] 2 WR 201; 166 ER 730 at p 731, *The Marpesia* (1872) LR 4 PC 212 at p 220, *The Schwan — The Albano* [1892] P 419 at p 434, *The Merchant Prince* [1892] P 170 at p 190, *Rumbold v London Country Council* (1909) 25 TLR 541, *Wong Eng v Chock Man Chong & Ors* [1963] MLJ 204, *Winnipeg Electric Company v Jacob Geel* [1932] AC 690).

[60] This court, with respect, wish to reiterate that any mechanical findings or short circuiting of a judicial duty to arrive at a judicial decision would no doubt, and with respect, frustrate the justice of the case and eventually may result in litigants possibly losing confidence in the justice system in this jurisdiction and they may turn elsewhere for justice on the ground that something is not right in the administration of justice. It is however important to reiterate at this stage that as much as this court sympathises with the plaintiff as he is paralysed as a result of the accident on 30 June 1996 but the duty of the trial court is still to judiciously determine who was responsible for the accident which had resulted in the injury bearing in mind that this is not court of morals, and neither is there in force the 'No Fault Liability Scheme' for personal injury in motor accident cases. 'No Fault Liability Scheme' means, fault becomes irrelevant as social insurance would provide compensation for all personal injury arising out of accidents upon the eligibility criteria being satisfied and would no longer require determination of liability or is subject to liability as negligence need not to be establish. This is a court of justice, not court of moral and as required by law, it is the duty of the plaintiff to establish his claim in tort of negligence against the defendant on the balance of probabilities. Accordingly, the findings or decision arrived at by the courts in this jurisdiction can only be determined according to the true facts which had emerged during the trial and the application of the law to the facts. The decision cannot be based on personal sentiment of the presiding judicial officer or judge or in a mechanical fashion or by travelling outside the pleadings and the evidence.

[61] If this court may be permitted to take this opportunity to make some observation of the treatment given to running down cases in the lower courts, speaking for myself and having been in legal practice and now on the bench, I must, with respect, observe that some lower courts seemed not to take running down cases seriously as part of the litigation process. In some cases, decisions are given in a mechanical fashion or embarked upon a course of speculation especially when the trial court is faced with scanty pieces of evidence and this places a heavy burden on this court when hearing appeals

and is unable to support the decision of the lower court. In some cases, this court is placed with an unpleasant task of having to interfere with the findings of fact. My sympathy is for the plaintiff when considering his disabilities but that personal feeling or sentiment does not permit me to override my judicial function under any circumstances. I am not prepared to compromise on the judicial oath that I have taken upon my elevation to the bench. This court will only act on the facts and the application of law and not on speculation or personal sentiment in order to find a case or try to make out a case in favour of the plaintiff. The chair I am seated is sacred and I wish to maintain it as sacred.

[62] In *Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207; Lord Keith of Kinkil said at p 211:

> There is a strong temptation, in an accident case where the circumstantial evidence is as scanty and inconclusive as it is here, to embark upon a course of speculation. It is, however, most important to refrain from founding upon any theory about the cause of the accident which has not been thoroughly tested in examination and cross-examination of witnesses. If the theory is so tested, the resultant reaction and demeanour of the witness may well be crucial in determining the issue of credibility and reliability. An appeal court should be most wary of upsetting the finding of the trial judge, who has seen and heard the witnesses, upon the basis of theories of their own as to the general probabilities, which have not been fully tested at the trial. Their Lordships consider, with the greatest respect, that the Federal Court have fallen into that sort of error in the present case. It is to be kept in view that it was for the plaintiffs to prove that the accident was caused, to some extent at least, by the fault of the lorry driver. The only evidence in support of their case was that of the car driver, but the trial judge rejected it. It is a strong step for an appeal court, which neither saw nor heard the witnesses, to hold that the trial judge was wrong to do so. Here the Federal Court have not only done that, partly on their view as to the general probabilities and partly by attaching significance to pieces of evidence in themselves completely neutral, but they have reached a contrary finding as to the cause of the accident which was not supported by any witness at the trial, and which necessarily involves, furthermore, that the car driver cannot have been telling the truth when he said he was driving as close as could be to his own side of the road.

[63] As for *the third party*, this court, with respect, is of the view that the third party had taken a great risk at the sessions court by submitting, 'no case to answer', where the totality of the evidence attracts a reasonable inference to be drawn that the third party's motorcar was involved in the collision with the plaintiff and that the defendant's version is inherently more probable and is likely to be the truth of how the accident had occurred. The reasonable inference which can be drawn from the set of facts and circumstances in the instant case is that, the third party (driver of motorcar No ACN 3772) had

first knocked into the plaintiff as he was crossing the road from A–D (as per the sketch plan exh P4) and upon the impact of that collision, the third party driver must have lost control of his motorcar and caused him to collide into the motor vehicles which were parked at the left side of the road. Further and as a result of the sudden collision into the plaintiff by the third party motorcar, the plaintiff must have been flung or pushed over to the defendant's side of the road and must have fell onto the defendant's motor van which is also consistent with the nature of the injuries suffered by plaintiff and the damage to the defendant's motorcar. In fact, it is to be noted that under cross examination by learned counsel for the third party, the defendant has categorically maintained his one and only version as to how the accident had occurred. Further, to a question by learned counsel for the third party through the court, the defendant had maintained his version which, inter alia, is as follows:

S: Bagaimana awak boleh beritahu dengan jelas tentang kereta yang lain itu?

J: Saya nampak kejadian di hadapan mata saya. Selepas kemalangan saya nampak nombor plet kereta itu. Keseluruhan badan plaintiff jatuh ke bahagian hadapan motor van saya. Dalam keadaan plaintif itu terpelanting saya tidak ada peluang, saya ada elak, saya ada tekan brek kecemasan.

Further, the defendant has testified at pp 69–70 of the record of appeal as follows:

Kelajuan m/van saya perlahan sahaja, oleh itu tiada kesan brek. P5C dirujuk.

Setuju lampu kanan hadapan pecah. Saya setuju bahawa kaca bertaburan di bahagian jalan saya dalam P4. Saya ada dalam mahkamah semasa plaintiff beri keterangan.

S: Plaintif kata hanya kamu yang melanggar dia.

J: Saya tidak setuju dan beliau bercakap bohong.

P4 dan P6 dirujuk.

Selepas kemalangan kereta ACN 3772 masih dalam bahagiannya tapi bahagian hadapannya terbalik kearah yang lain. Tempat ini tempat letak kereta. Sekarang saya kata ada kenderaan yang terletak di tepi jalan di tempat letak kereta.

S: ACN 3772 hanya melanggar kereta yang terletak di tepi jalan?

J: Saya tidak setuju.

Saya tidak setuju bahawa saya buat laporan polis yang palsu dengan kata plaintif dilanggar oleh kereta lain.

Saya tidak setuju bahawa saya cuai dan mengakibatkan kecederaan plaintif. Saya nampak kereta itu datang dengan laju.

[64] In *Fardon v Harcourt-Rivington* [1932] All ER Rep 81, at p 83, Lord Dunedin said:

> The root of this liability is negligence and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions, (see *KR Taxi Service Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49).

Lord Macmillan said:

> Members of the public motor owners, and pedestrians alike, in their use of the highway, owe to each other a duty to take care that they do not injure each other. The mere circumstance of being on a highway brings them into a relationship with each other from which relationship arises the duty to have regard for each other's safety. In each case the question is whether there is any evidence of such carelessness in fact as amounts to negligence in law - that is to breach of the duty to take care. To fulfil the duty the user of the road is not bound to guard against every conceivable eventuality, but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience.

[65] In *Jafri Elias v Khor Tang Seah* [1992] 2 CLJ 601 (Rep); [1992] 2 CLJ 1016, His Lordship KC Vohrah J (as he then was) at p 1019 said:

> In my view it was unjustified for the judge to put liability at all on the defendant when the plaintiff had not discharged the onus of proof on him on balance of probabilities that the accident was caused by negligence of the defendant either wholly or partially and I therefore allowed the appeal of the defendant with costs (see *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 at p 244).

[66] In *Daborn v Bath Tramways Motor Co Ltd & Trevor Smithey* [1946] 2 All ER 333, A Squith LJ:

> In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.

[67] Had the learned sessions court judge considered and evaluated the totality of the evidence in its proper perspective and judicially, he ought to have dismissed the plaintiff's claim against the defendant.

APPORTIONMENT OF LIABILITY

[68] As to the apportionment of liability on 50:50 basis, it should not be applied mechanically or import such a finding or apportionment from another case or as found in *Baker v Market Harborough Industry Corporative Society Ltd* [1953] 1 WLR 1472; *Joseph Eva Ltd v Reeves* [1938] 2 All ER 115; [1938] 2 KB 393. Liability cannot be apportioned mechanically on 50:50 in order to decide a running down case as each case is based on its own sets of facts. Accordingly, the apportionment of liability as found in *Baker v Market*; *Joseph Eva v Reeves* cannot automatically be applied to the facts in the instant case. Judicial precedent should not be confused with findings of fact as both are independent of each other. It is only in cases where both parties to a road accident or the trial court finds to blame each other or it is found that neither of them to be free from blame and the trial court is unable to distinguish liability between them, the court may in those circumstances, proceed to find or cast the blame equally between them.

[69] In *Baker v E Longhurst and Sons Limited* [1933] 2 KB 461, Scrutton LJ said at p 464 as follows:

> The decision in *Tart v Chitty* was a decision on the particular facts of that case and did not bind the county court judge. The facts of that cases are different from the facts in the present case several respects. Talbot J in the present case held that *Tart v Chitty* laid down no general principle of law which could be applied to the particular facts of other cases. Lord Watson in *Wakelin v London and South Western Ry Co* said that 'the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour'. The county court judge has held that the defendants had not satisfied him that the plaintiff was guilty of contributory negligence. Whether or not a person has been guilty of negligence is a question of fact, and the finding of the county court judge ought therefore to be conclusive.
>
> Now every case must depend upon its own facts, and therefore it is not much good citing the fact that in another case a certain conclusion has been arrived at by different judges, (see *Baker v Market Harborough Industry Corporative Society Ltd* [1953] 1 WLR 1472 at p 1476, *Ong Yam Chong & Anor v Chan Wah* [1962] MLJ 184).

[70] Alternatively, the finding of equal liability may also arise in the case of collision at cross roads where both roads are of equal status with no major or minor road and in the absence of positive evidence or of special circumstances, against one party, there is a presumption that both drivers are equally negligent, (see *France v Parkinson* [1954] 1 All ER 739). In *Ong Yam Chong v Chan Wah* [1962] MLJ 184 at p 187, Thomson CJ said:

I think I should make it clear that in my view we are not treating the decisions of the English Court of Appeal in *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472, at p 1476 and in *France v Parkinson* [1954] All ER 739 as laying down any rule of law but rather as illustrative of the application of principles of logic and common sense to circumstances which do not infrequently arise.

[71] The learned sessions court judge had also misdirected himself when he relied on the decision in (1) *Chew Soo Lan v Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205 and (2) *Ng Aik Kian & Anor v Sia Loh Sia* [1997] 2 AMR 697 for the basis of apportioning equal liability between the plaintiff and the defendant. The findings on liability in respect of both the cases referred to above are not principles of law or stare decisis or to be regarded as judicial precedent in deciding other cases and ought to have been distinguished on the facts of the two cases when compared with the facts in the instant case which are poles apart. The learned sessions court judge with respect, had misunderstood illustrations or findings of fact on particular sets of facts and circumstances in other cases as laying down judicial precedent or principles of law and mechanically applied the decisions and the apportionment of liability as found in those two cases to the facts in the instant case. 'Cases of road collision due to negligence are questions of facts.' (per Selesser LJ in *Tidui v Batman* [1934] 1 KB 314 at pp 321–322). 'No one case is exactly like another and no principles of law can in my opinion be extracted from those cases'. (per Lord Wright in *Tidui v Batman* [1934] 1 KB 314). Every case must depend upon its own sets of facts. In *Ogden Industries Pty Ltd v Lucas* [1969] 3 WLR 75, Their Lordships of the Privy Council at p 85 said:

> They desire to reiterate however what has so often been said before that in a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncement of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent cases their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
>
> No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and absolve the court from its duty of exercising an independent judgment. It is with these principles in mind that their Lordships approach this very considerable body of authority.

[72] Therefore, it is not much good citing the decision or certain findings arrived at by different judges and applying it as a binding precedent. The decision in both the cases namely (1) *Chew Soo Lan v Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205 and (2) *Ng Aik Kian & Anor v Sia Loh Sia* [1997] 2 AMR 697 referred to by the learned sessions court judge was a finding on the particular set of facts of that cases which are different from the facts of the present case in several aspects.

[73] Further still and with respect, the decision of the Federal Court in *Chew Soo Lan v Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205 where liability was apportioned equally (50:50) between the driver of the motorcar (in which the deceased was travelling as a passenger) and the defendant which was relied on by the learned sessions court judge had been reversed on appeal by the defendant to the Privy Council. The apportionment of liability on a 50:50 basis as held by the Federal Court was set aside by the Privy Council and the findings of the trial court which had dismissed the plaintiff's claim was restored (see *Ludhiana Transport Syndicate & Anor v Chew Soo Lan & Anor* [1979] 2 MLJ 207).

[74] In *Morris v Luton Corporation* [1946] 1 KB 114, Cassels J at p 115 said as follows:

> There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps sometimes slip unconsciously — I may have done it myself for all I know — but it is much to be deprecated, because these are questions of fact dependent on the circumstances of each case, I cannot regard that observation of Scrutton LJ's as in any sense affecting other cases where the circumstances are different. In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observation of Lord Wright sitting in this court in *Tidy v Batman.* He says there, referring to *Baker v Longhurst & Sons Ltd* and one other case, that they show 'that no one can in my opinion be extracted from' those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts. That was the observation of one member of this court. I now adopt it myself and if, my brethren take the same view on that, in future there will be the unanimous opinion of three members of this court that is the law, and I hope that may conduce to the certainty of the of the law in these matters.

[75] It is appropriate to state at this stage that the best lawyers of all generation have been devotees of honesty. It is the duty of a lawyer, if he is honestly satisfied that the adverse precedent he has come across is directly in point, to draw the attention of the court to that case, come what may, and

if necessary to do his best to differentiate it or to submit to the court not to follow the authorities. As a lawyer, he must at times remember that he is only the servant of the client but a friend of the court and honesty is as essential to true friendship as it is for effective advocacy in the important enterprise of dispensing justice. In *Queen v O'Connell* [1844] 7 Irish Law Reports 313 Crampton J said:

> He (the advocate) is a representative but not a delegate. He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and others. He will not knowingly misstate the law, he will not wilfully 'misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual and retained and remunerated often inadequately for his valuable services yet he has a price and perpetual retainer on behalf of truth and justice and there is no crown or other licence which in any case or for any party or purpose can discharge him from that primary and permanent retainer.

It is in this context, the court is entitled to rely on counsel's argument and not misleading it. On the question of facts, the duty of the counsel in the matter is absolute.

[76] As to the sketch plan drawn by the defendant's solicitors in support of his written submission presented at the lower court and included at p 114 of the record of appeal (lampiran 7), it may in some cases assist or facilitate the court by demonstration to comprehensively consider the probable version as to how the accident had occurred in a proper perspective. However, the said sketch plan drawn by the solicitor should not be taken into consideration as evidence as it is purely to assist the court to have a clearer understanding or version so as to be able to follow the conflicting versions as given by the parties.

It is to be noted that even in cases, where the decision of the trial court is based on the credibility of witnesses, the appellate court has been justified in interfering with findings of fact if the conclusion is considered to be clearly wrong. However, in the instant case, the decision of the learned sessions court judge is not based on the credibility of witnesses but is based on the notes of evidence as recorded by his two predecessors. In any event, this court wishes to refer to some of the cases where the appellate court had interfered with findings of fact to prevent a miscarriage of justice upon review of all the evidence where the trial court had the advantage of hearing the witnesses and obtaining an impression of their veracity from their demeanour.

[77] In *Chia Han Kiat v Rex* [1937] MLJ 261, Terrell Ag CJ said (at p 261):

> This is admittedly an appeal against findings of fact, and I fully indorse the principle that an appellate court should but rarely interfere with conclusion arrived at by the judge or magistrate who has had the advantage of hearing the witnesses

and obtaining an impression of their veracity from their demeanour. But it is the duty of an appellate court to be judge of fact as well as of law, and it would be abrogating its function if it made a hard and fast rule never to interfere with findings of fact, and felt bound to support a judgement which, on a review of all the evidence, it considered to be clearly wrong, (see *Development and Commercial Bank v Num Tjuan Sdn Bhd* [1989] 1 MLJ 475 at p 476–477), *Sivalingam Periasamy v Periasamy & Anor* [1996] 4 CLJ 545 at p 550, *Coghlan v Cumberland* [1898] 4 Ch D 24 and *Bigsby v Dickson* (1876) 4 Ch D 24).

[78] In *Chung Hwa Ying v Phang Mun Mooi & Anor* [1987] 2 MLJ 693 at p 694, His Lordship Syed Agil Barakbah SCJ said:

... In normal cases, the appellate court is reluctant to interfere with the judge's conclusion on the facts because as a trial judge he has the opportunity to see and hear the witnesses and is in a better position to weight their evidence. In the present appeal, however, he has failed to make proper use of this opportunity and has come to a wrong conclusion on the facts which in the circumstances necessitate this court to interfere and prevent a miscarriage of justice.

[79] In *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403, the Supreme Court at p 404 said as follows:

More recently in *Nance v British Columbia Electric Railway Company* [1951] AC 601, at p 611 Lord Simon said:

… when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove... that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury. For when contributory negligence is set up a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

The test of contributory of negligence, in our judgment, is based entirely on the conduct of the plaintiff in that particular accident or case …

In *Ramoo v Gan Soo Swee* [1971] 1 MLJ 235 at p 239 Lord Cross in giving the judgment of the Privy Council said:

Their Lordships are not sure that had they been trying the case they would in all circumstances have attributed so much of the blame to the lorry driver but it is only in exceptional circumstances that an appellate court is justified in interfering with an apportionment of liability made by the trial judge (see *The Macgregor* [1943] AC 197).

Accordingly Their Lordships direct that the judgment of the Federal Court be set aside and that of Buttrose J restored and that the respondents pay the costs incurred by the appellant before the Federal Court and their appeal to the Board.

Applying this to the facts of the present case, it is plain that the learned judge had misdirected himself both on the fact and the law when he was dealing with the respondent's case and contributory negligence. Based on his findings the learned judge should have held that (a) that respondent was riding his motorcycle without keeping any proper lookout, (b) that he attempted to overtake the said motorcar on the right when it was unsafe to do and (c) that the cause of the accident was due entirely to his own negligence. Not only would we set aside the apportionment of one-third blame attributed to the appellant and two-third to the respondent, we would also quash the whole of the court order and enter judgment in favour of the appellant and direct that the claim of the respondent against the appellant be dismissed.

[80] In *Kelapa Sawit (Teluk Anson) Sdn Bhd v Yeoh Kim Leng & Ors* [1991] 1 MLJ 301; the Supreme Court held at p 305:

> The question that has to be answered is whether in fact there is evidence to justify the finding of fact by the learned judge. It is generally accepted that an appellate court should not disturb the finding of a trial judge who had the advantage of seeing the witnesses and evaluating their credibility unless it can be shown that he had failed to use or palpably misused his advantage (see *Chong Sooi Chuan v Yuen Lai Choon* [1988] 2 MLJ 443, a Supreme Court decision, and *Siti Aishah binti Ibrahim v Goh Cheng Hwai* [1982] CLJ (Rep) 326 per Abdul Hamid (FJ as he then was at p 328) where he quoted the Privy Council decision in *Yahya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117:
>
> > That it is only in a rare case that the appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility.
>
> We also bear in mind, in this regard, the speech of Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582, at p 587:
>
> > The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.
>
> In the present case it is necessary for us to determine by examination of the evidence adduced at the trial whether the finding of fact by the learned judge could be justified.

[81] In *Johara Bi bt Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 at p 142, His Lordship Chang Min Tat FJ said:

... But quite clearly, his decision was reached via an inference drawn entirely from a serious error of fact and in drawing this inference, he had not merely considered evidence which was not established but had failed to take into account the probative value of evidence which had been proved or was common to both parties. In these circumstances the inference he drew cannot be sustained and this court can and must come to the view, on the question of onus of proof, that the appellant had on a balance of probabilities, discharged the onus on her, the burden then shifted to the respondents and as held by the learned trial judge, the respondents had not discharged the burden even on a balance of probabilities and there should have been judgment for the appellant.

[82] In *Jones v Great Western Railway Co* [1930] 144 LT 194, at p 202, Lord Macmillan explained the meaning of an inference and its effect in law, thus:

An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction it may have the validity of proof.

The question therefore arises, what is a reasonable inference? The answer to this question is provided by Lord Wright in *Caswell v Powell Duffryn Associates Collieries Ltd* [1940] AC 152 at 169:

Inferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

The provisional or evidential burden of proof, as opposed to the legal burden of proof, which had been raised by the state of the evidence, should then have shifted to the defendant driver to rebut the prima facie case, by showing, if he could, that only the leg injury but not the head injury, had been caused by him, since this was a matter especially within his knowledge. We are supported in this by s 106 of the Evidence Act (Revised – 1974) which provides.

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Nevertheless, the defendant driver who was present in court and was the only person who had the necessary knowledge to testify as to the causation point had studiously elected not to give evidence. This omission by the defendant driver to testify should strengthen the inference that could reasonably be drawn from the facts proved by the plaintiff (see *R v Burdet* [1820] 4 B & Ald 95 at pp 161–162; *Jones v Dunkel* (1959) 101 CLR 298).

By way of postlude, we must add a final point regarding this part of the case lest we be accused of an oversight. We recognise, as we must, that a Court of Appeal, will naturally be reluctant to interfere with a finding of fact by the trial judge who has had the inestimable advantage of watching the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to

describe which make up the atmosphere of an actual trial. (Per Lord Macmillan in *Watt v Thomas* [1947] AC 484, at pp 490–491). But, having said that, we could draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case — and the present case is such a case — the appellate court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts (see *Benmax v Austin Motors Co Ltd* [1955] AC 370).

[83] In *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at p 38, His Lordship Syed Agil Barakbah SCJ (as he then was) said:

> This is a case where the learned trial judge has failed to take into account the probative value of the evidence which had been proved and in the circumstances we have to interfere (see *Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139; *Mohd Yusof bin Rakim & Anor v Shanta Perisamy & Anor* [2006] 4 AMR 837).

[84] In *Burns v Devon's Iron Works Ltd* [1961] SC 102 at pp 102–108, Clerk Thomson LJ said:

> The court is often charitable to records, and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only grounds of faults averred and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred (ie pleaded), but is something which is new, separate and distinct, we are not in a realm of technicality.

[85] In *Chih Lim Neo v Sit Hoon Neoh* [1889] 4 KY 492, the Singapore Court of Appeal by a majority decision under *held* said:

> ... where the evidence preponderates in favour of the appellant, this court will act on such evidence and even reverse the judgment of the court below … on a point of fact.

[86] In *Woon Ngee Yew & Ors v Ng Yoon Thai & Ors* [1941] MLJ 37 at p 43, the Lord Chief Justice McElwaine (SS) said:

> An appellate court should be very loath to differ on a finding of fact by a court which has seen and heard the witnesses but if the learned judge can be shewn to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference it may be the duty of an appellate court to interfere.

[87] In *Lofthouse v Leicester Corporation* (1948) 64 TLR 604, Lord CJ Goddard said:

> I have known cases where this court has interfered because it has thought that the judge who tried the case has decided how the accident happened not on the evidence given, but on how he thought that the accident probably happened.

[88] In the case of *Sivalingam Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, His Lordship Gopal Sri Ram said (at pp 398–399):

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[89] In *Development & Commercial Bank Bhd v Num Tjuan Sdn Bhd* [1989] 1 MLJ 475, His Lordship Lee Hun Hoe CJ (Borneo) observed:

> … It is of course the duty of an appellate court to be a judge of fact as well as of law. At the same time it would be abrogating its function if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on review of all the evidence, it considered to be clearly wrong. The learned judge had given his reasons for disagreeing with the SAR (see *Lee Soh Hua v Kow Lup Piow & Ors* [1984] 2 MLJ 101 at pp 104–105)

[90] In *Manager, Tuborg (Malaysia) Sdn Bhd v Public Prosecutor* [1990] 2 MLJ 173 at p 178, His Lordship Wan Yahya J said:

> It has often been said that the appellate court should be slow in interfering with the findings of fact by a lower court, but where such findings are based on wrongful or unjust inferences drawn by the trial judge, then the appellate court would be abrogating its functions if it refuses to review the findings of the lower court — (see *Benmax v Austin Motor Co Ltd* [1955] AC 370 which was followed in *China Airlines Ltd v Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 and applied in *Mohd Samsudin Ismail v Tan Yeow Hwa & Anor* [2000] 4 CLJ 398).

[91] In *Watt (or Thomas) v Thomas* [1947] 1 All ER 582, Lord Thankerton laid down the following principles:

(I) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any

advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

(II) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

[92] In *Abrath v North Eastern Rly* (1883) 11 QB D 440, Bowen LJ said:

> Whenever litigation exists somebody must go on with it, the plaintiff is the first to begin, if he does nothing he fails, if he makes a prima facie case and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof is simply: to ask oneself which party will be successful if no evidence is given, or if more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on the parties from moment may reach points at which the onus of proof shifts, and at which the tribunal would have to say that if the case stops there, it must be decided in a particular manner. It is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests.

[93] In *Lim Chor Ching & Ors v Idris Abdul Karim & another appeal* [1998] 3 CLJ Supp 145 His Lordship Suriyadi Halim Omar J (as he then was) at pp 155–156 said:

> Attempting to comprehend the grounds of decision of the learned sessions court judge, it was crystal clear that she merely resorted to the two versions submitted by the parties, and thereafter selected the respondent's version. This manner of resolving the issue at hand, by having partial blinkers, is very much to be desired, and requires certain comments. By alluding to this technique, which restricted her freedom of choice to two versions only, and which was not necessarily correct, resulted in her ignoring, or being blissfully oblivious to other possible propositions. The learned judge should have considered other probable versions, so long as they were within the scope of the pleadings and supportable by admissible evidence, particularly by the neutral ones. These evidence, at the same time must not be read in isolation, but together with the testimony of the credible witnesses. By following

this course of action, a judge will be in the opportunistic position to capitalise on the wide berth, and arrive at a judicious decision without being encumbered by restrictions (*Koay Teik Choo & Ors v Reg* [1956] MLJ 52). Lim Beng Choon J in *Noorianti bt Zainol Abidin (F) & 8 Ors v Tang Lei Nge & Tang Lye Chang* [1990] 1 CLJ 943, had occasion. also to articulate that, albeit restrictively, a trial judge should not approach the case on the basis of deciding which story out of the two conflicting stories should be believed, but rather on the basis of considering which version was inherently probable or improbable. Only after those steps had been adhered to, and the abovementioned elements considered, may a judge thereafter decide. Of course, if the version of one of the parties is inherently probable, then it is encumbent upon the judge to accept that version (*Chua Chong Cher v Teo Lang Keow & Ors* [1970] 2 MLJ 27). Appellate courts, normally, are reluctant to interfere with the finding of facts of originating courts, as the relevant judges were in the superior position of having had the opportunity to observe the demeanour and hear the testimony of the relevant witnesses. Those judges generally too would be in a better position to weigh the evidence laid before them (*Bong Nyi Moi v Narayanasamy & Anor* [1973] 1 MLJ 250; *Uval & Anor v Zainal* [1970] 1 MLJ 74). Inspite of these strong views generally held by courts, an appellate court on the other hand will not hesitate to interfere if the subordinate courts are clearly found to have acted on wrong principles, or that a miscarriage of justice had occured in the circumstances of those cases. Lord Denning MP in *Kerry v Carter* [1969] 1 WLR 1372 at p 1376 had occasion to say:

> We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. Lord Tankerton in *Watt Or Thomas v Thomas* [1947] AC 484 at p 488 had also occasion to say: The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his haying seen and heard the witnesses, and the matter will then become at large for the appellate court. This remark was approved by Lord Keith of Kinkel when delivering the oral judgment of the Privy Council in *Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165 (see also *Powell v Streatham Manor Nursing Home* [1935] All ER 58; *Chia Bak Eng & Anor v Ponggol Bus Service Co* [1966] 2 MLJ 224). Based on the above authorities, I had no compunction in setting aside the finding of the sessions court judge, as not only were the facts-misapprehended, but the wrong principles of law were applied.

NO CASE TO ANSWER BY COUNSEL FOR THE THIRD PARTY

[94] The election to submit 'no case to answer' by learned counsel for the third party was a great risk on the facts and circumstances in the instant case, and in some cases, the party must be prepared to accept the fate of the consequences arising out of such election taken on his behalf. Where there are sufficient facts to draw an inference that the third party motorcar did in fact

knock into the plaintiff as he was crossing the road from (A–C) as per the sketch plan (exh P4) as a result of which it had caused the plaintiff to be thrown onto the defendant's path of travel, it was most unwise to elect not to adduce evidence to rebut the defendant's version of the accident.. In this respect, learned counsel for the third party on questioned by this court as to whether the election was put to him by the learned sessions court judge, had confirmed that the same was put to him although the notes of evidence does not contain adequate details of the election having been put to the third party. However, since the plaintiff had failed to establish negligence against the defendant on the balance of probabilities and he did not include the third party as a joint-tortfeasor, there is no nexus in law between the plaintiff and the third party. Accordingly, the third party cannot be directly found liable to the plaintiff's claim.

[95] As to the traffic summons which was issued to the third party, this court is satisfied that the summons was in respect of the collision against the motor vehicles which were parked at the left side of the road and this piece of evidence ought not to be taken into consideration for the purpose of determining liability. Nevertheless, the fact still remains that there is sufficient evidence adduced by the defendant to draw an inference of the involvement of the third party's motorcar with the plaintiff prior to the collision with the defendant's motorcar on considering the totality of the evidence.

[96] In the circumstances, the learned sessions court judge ought to have found that the third party motorcar had collided into the plaintiff which had resulted the plaintiff being thrown to the defendant's motorvan as testified by the defendant. Therefore, and in the absence of any rebuttal evidence by the third party, the evidence adduced by the defendant against the third party would be assumed to be true. However, it is important to note that it is the defendant who brought the third party driver to be included as a third party to the proceedings based on the version as stated in his police report and his evidence in court as to how the accident had occurred and that it was not based on the plaintiff's version as the plaintiff had denied any collison with the third party motorcar and has not alleged or pleaded any negligence against the third party driver. Therefore, it may have been prudent on the third party to rebut the defendant's evidence who had consistently and in no uncertain terms testified of another vehicle which was travelling on the other side of the road (in the opposite direction) which had knocked the plaintiff and this had caused the plaintiff to be thrown onto the direction of the defendant and as a result the defendant's motor van had knocked into the plaintiff since the third party did not support the defendant's version which had rebutted the plaintiff's version of how the accident had occurred. Nevertheless, since the plaintiff had failed to include the third party driver as a joint tortfeasor or had established any negligence against the defendant as

pleaded and as required by law and the fact that the learned sessions court judge did not accept the plaintiff's version as the truth or the probable version as to how the accident had occurred, the learned sessions court judge consequently ought to have dismissed the plaintiff's claim against the defendant. In another words, the decision must be based upon material which tends logically to show the existence or non-existence of fact relevant to the issue to be determined, which means, the court cannot spin a coin to determine liability but it may take into account any material which, as a matter of reason, has some probative value.

[97] Had the plaintiff included the third party driver as a defendant (joint tortfeasor) and told the truth, he may have succeeded to some extent and may have been able to recover damages to some extent from the driver of the motorcar No ACN 3772 but unfortunatley the plaintiff has refused to admit the same and did not implicate the third party to the said accident. As this court had found that the plaintiff had failed to establish any negligence against the defendant, on the balance of probabilities, there is no justification of finding against the third party because the driver of the motorcar No ACN 3772 was included as a third party on the defendant's application in the proceeding between the plaintiff and the defendant, solely for the purpose of claiming contribution and indemnity in the event, the defendant is found to be negligent. Since this court has found the defendant not to be negligent for the accident, the claim for contribution and indemnity by the defendant against the third party does not arise.

[98] Order 12 r 1(1)(a) and r 2(2)(a) of the Subordinate Courts Rules 1980 provides that:

> (1) When in any action a defendant who has filed a defence to the action:
>
> (a) claims against a person not already a party to the action any contribution or indemnity;
>
> then, the defendant may, with the leave of the Court, issue a third party notice in Form 27 containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.
>
> (2) Where an order is made granting leave to issue a third party notice:
>
> (a) the person must be added as and shall become the third party to the action;

[99] Based on the provision of O 12 of the Subordinate Courts Rules 1980, it is clearly stated that when a third party notice is served on a third party

named in that third party notice, from the time of the service or receipt of the third party summons, the party to that action which is now being referred to, is a third party, the most important word in such situation is that the third party is a party in the same proceeding. Therefore, the third party can be examined and his evidence can be elicited through cross examination if the third party chose to give evidence in an action involving the plaintiff's claim against the defendant and the *evidence of the third party can be used as the evidence for the plaintiff's claim* or the defendant.

[100] The object of third party proceedings is clearly stated in *Barclays Bank v Tom* [1923] 1 KB 221 at p 224:

> *The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant.* In the next place it is directed to getting the question between the defendant and the third party decide as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions. *With these objects in view the third party order usually provides that the third party may appear at the trial between the plaintiff and the defendant.* (Emphasis added.)

[101] In *Eden v Weardale Iron & Coal Company* (1887) 35 Ch D 287, Cotton LJ it has explained as to the position of a third party.

> They (third party) were put in the position of being entitled to attend, as opponents of the plaintiff, at the trial of the action, that is to say, to take part in the proceedings just as if they were defendant, but *with this qualification that they could not be made directly answerable to the plaintiff in the action.* And, in my opinion, that carries with it the right to take any such proceedings previously to the trial of the action which a person made a defendant by the liberty given to attend proceedings might take, including also the right under Rule 1 or Order XXXI to interrogate the plaintiff. (Emphasis added.)

[102] Therefore, following the case of *Barclay's Bank v Tom* [1923] 1 KB 221, if the purpose of including third party is to implicate him to a decision to be made in court between a plaintiff and a defendant, then fortiori, the evidence of the third party is relevant and should be taken into consideration. In fact, the third party is entitle to participate and cross examine the plaintiff and the defendant as was carried out in the instant case. Further, via parallel analogy, the plaintiff can also prove negligence against the defendant under

this rule by applying the methods proposed in the case *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291 (*Neo Chan Eng*) ie:

(i) by his own evidence, or

(ii) by cross-examining the defendant; or

(iii) by the defendant's admission; or

(iv) by cross examining the third party if he elects to testify on oath (included by this court).

(v) By the third party's admission (included by this court).

[103] In the instant case, the third party has been named in the action between the plaintiff and the defendant for the said accident and his evidence is important and material to determine the cause of the accident. The third party can be said to be privy to the said accident and without his evidence at the proceedings, there is a possibility that the cause and effect of the accident could not be truly proved and this is a grave injustice. In the instant case, there is a causal link which had occurred between the plaintiff and the third party and the evidence adduced by both the plaintiff and the defendant is intertwined, as one party cannot exist without the other. On the facts and circumstances in the instant case, if the reason for including the third party is to link with the decision of the court between the plaintiff and the defendant a fortiori, the evidence of the third party is relevant and should be adduced on the facts and circumstances in the instant case. If this is not adhered to, the decision of the court which is only based on the plaintiff and defendant may amount to an injustice and does not, inter alia, achieve the purpose of including the third party in the proceeding and defeat the basic fabric of a trial which is to discover the truth especially when the learned sessions court judge had found the defendant 50% liable to the accident which is of course, grossly against the weight of the evidence. It is clear that the third party in this proceeding is an opposing party to the defendant but however, he has the option to elect not to testify on oath and submit 'No case to answer' depending on the facts and circumstances on a case-to-case basis.

[104] In cases where the defendant has obtained leave to include a person not already a party to that action as a third party, then arises the question of contribution or indemnity. For this purpose, O 12 of the Subordinate Courts Rules 1980 procedure was invoked to prevent multiplicity of action and to enable the court to determine dispute between all parties relating to or connected with the original subject matter of the action and submitting the same as claimed by the plaintiff in one action to prevent the same question from being tried twice with possibility of different result (see Civil Law Act

1956, ss 10, 12(i), (iii) and (v), *Standard Securities Ltd v Hubberd & Anor (Telesurance third party)* [1967] Ch 1056; *Pacific Asia Leasing (M) Sdn Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku Kamil Ikram, third party)* [1992] 2 MLJ 364) The third party on being served with the third party notice becomes a party to that action, as though he has been sued by the defendant (see *Barclays Bank v Tom* [1923] 1 KB 221). On the other hand, it is to be noted that the third party is not a defendant as against the plaintiff (see *Eden v Weardale Iron & Coal Company* (1887) 35 Ch D 287 and *Edison & Swan Co v Holland* (1889) 41 Ch D 28).

[105] On the facts in the instant case, the defendant had proved a prima facie case against the third party for him to answer the defendant's third party claim against him. Therefore, on the facts, it would have been prudent for the third party to rebut the prima facie negligence as adduced by the defendant against him, by testifying on oath that the main cause of the accident was allegedly due to the defendant's negligence or for other causes and it was not due to his own negligence and or that he had taken appropriate measures to avoid the accident. It is insufficient to put up a bare denial through submission and to have elected to submit no case to answer. Nevertheless, on the facts, it is fortunate that there is no liability attached against the defendant as found by this court. The evidence of the IO (PW3) could also not assist the plaintiff. Therefore, it is unsafe for the third party to have relied on the unreliable evidence of the plaintiff and speculation by the IO (PW3) that the third party's motorcar was not involved with the plaintiff when he elected not to testify on oath. However, it is important to observe that the plaintiff's evidence is not helpful to even support his own case against the defendant to sustain any blame against the defendant.

[106] On the totality of the evidence, this court finds that the defendant had established sufficient evidence to rebut the plaintiff's evidence and that the third party was involved in the accident with the plaintiff and that due to the collision with the third party's motorcar, the plaintiff was thrown onto the defendant's motorcar. Therefore, it was not safe for the third party at the trial to have elected to submit 'no case to answer' as there is in fact sufficient evidence to call the third party to answer. Nevertheless, this court has repeatedly said that since the plaintiff chose not to include the third party driver as a joint-tortfeasor, the plaintiff must be prepared to accept the fate as found by this court, (see *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152; *Yuill v Yuill* [1945] 1 All ER 183; *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239; *Teoh Guat Looi v Ng Hong Guan* [1998] 4 MLJ 525; *Storey v Storey* [1960] 3 All ER 279; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693)

In fact, the plaintiff should have been truthful in his evidence and rightfully ought to have included the driver of the third party motorcar No ACN 3772 as a co-defendant and sued both the drivers as joint tortfeasors. In those circumstances, even if the claim against the defendant is dismissed and the driver of the motorcar No ACN 3772 has been found negligence to some extent, liability could have been apportioned between the plaintiff and the driver of the motorcar No ACN 3772 if he had been included as a defendant and as a joint tortfeasor with the particulars of negligence pleaded against him. However, it was the plaintiff's choice not to have sued the driver of the motorcar No ACN 3772 as joint tortfeasor and therefore, he must be prepared to accept the fate of this decision.

[107] In the circumstances, it is only reasonable and justified to rely on the evidence of the defendant who had the courage to take the witness stand to assist the court as to how the accident had occurred. Whereas the third party driver at his own risk had withheld his version from the court when he had the opportunity to rebut the defendant's version against him. In fact it was the defendant who could have elected to submit 'no case to answer' to the plaintiff's claim against him since the particulars of negligence as pleaded in para 3 of the statement of claim and coupled with the fact that the plaintiff has testified that he does not know how the accident had occurred and the fact that the learned sessions court judge had not accepted the plaintiff's version as to how the accident had occurred ie that is he was walking on the right side of the road as one faces towards direction of the hospital when the defendant's motorcar is supposedly to have come from the opposite direction and collided onto the plaintiff. Unfortunately, the learned sessions court judge with respect, had failed to evaluate the evidence judiciously and had drawn wrong inferences and misdirected himself in law and on the facts by finding liability against the defendant and apportioning liability in a mechanical fashion between the plaintiff and defendant on a 50:50 basis by relying on the two cases namely: (1) *Chew Soo Lan v Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205 and (2) *Ng Aik Kian & Anor v Sia Loh Sia* [1997] MLJU 143, where there is no factual or legal basis to arrive at such a finding on the totality of the evidence. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other material evidence and the circumstances of the case and not by short circuit.

[108] However, since this court is of the considered view that the plaintiff's claim against the defendant ought to have been dismissed, then there is no question of making any finding for contribution against the third party, as, if there is no negligence against the defendant, then there is no contribution

or indemnity to be placed against the third party for which the defendant had included the driver of the motorcar No ACN 3772 as a third party.

[109] In considering that the learned sessions court judge who decided the case in the lower court did not see or hear any of the witnesses and had decided the case on the evidence as recorded by his predecessors coupled with the fact that the brief reasoning of the learned sessions court judge is inconsistent and contains misdirection by way of non-direction, it would have been appropriate for the case to be retried de novo and ought not to have continued by the third learned sessions court judge. There is also no record who had directed the third learned sessions court judge to deliver the decision or to continue with the case.

[110] In *Chua Chee Chor v Chua Kim Yong & Ors* [1960] 1 MLJ 127, Thomson CJ (at pp 127–128):

> The case had an unfortunate history. It came on for hearing in October 1954, before a judge who heard all the evidence but who reserved judgment and was then obliged on medical grounds to retire before he could give judgment. In these unfortunate circumstances the normal course would have been for the case to be retried de novo. This, however, would have involved considerable expense and in the event the parties asked that Neal J, should decide the case on the evidence as recorded by his predecessor. For myself I have grave doubts as to the regularity of this course, particularly as there was a great deal of conflict of testimony in the case. It is only fair to say that Neal J had considerable doubts himself. On the other hand the case can be distinguished from the English cases of *Bolton v Bolton* [1949] 2 All ER 908; *Coleshill v Manchester Corp* [1928] 1 KB 776 and *Re British Reinforced Concrete Engineering Co Ltd's application* 45 TLR 186. In all these cases part of the evidence was heard by the magistrate or judge who commenced the case and part was heard by the magistrate or judge who concluded it and gave judgment. In the present case, however, all the evidence was heard by Neal J's predecessor and Neal J did not see or hear any of the witnesses. The parties themselves agreed to the case being decided on the evidence as recorded by Neal J's predecessor. Before us neither party has taken the point of irregularity and in the circumstances for myself I am not disposed to take the point although I would express my very strong view that the precedent is not one to be followed.

[111] However, as the case was filed in the sessions court 12 years ago and the plaintiff had since returned to Indonesia and considering the cost that would be incurred if there was an order for a retrial and on the exceptional circumstances of this case and where the learned counsel for the third party had elected at the trial to call no evidence and the plaintiff himself chose not to sue the third party driver, this court has decided not to order a retrial and give the plaintiff a second bite in the cherry or a second opportunity to cure

the deficiencies in its case against the defendant. Therefore, there is no order for retrial.

AWARD FOR LOSS OF EARNING TO THE PLAINTIFF

[112] The learned sessions court judge after having found that the plaintiff was an illegal worker had erred in law and on the facts in awarding damages for the loss of earnings which was illegally earned. It is not disputed that the plaintiff had worked prior to the accident and generally would be entitled to claim for loss of future earnings as a result of the accident and based on the nature of injury, disabilities and subject to proof as provided under s 28A of the Civil Law Act 1956 ('the Act'). In order to entitle a claimant for the loss of future earnings as provided in s 28A of the Act, he has to produce sufficient evidence to establish his loss. Section 28A of the Act, inter alia, states:

> 28A Damages in respect of personal injury.
>
> (1) In assessing damages recoverable in respect of personal injury which does not result in death …
>
> (2) (c) *in awarding damages for loss of future earnings the Court shall take into account* —
>
> (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded *unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured*;
> (Emphasis added.)

[113] However, in the instant case, there is evidence produced to show that the plaintiff's income was illegally earned as he did not produce any valid employment pass issued by the controllers or any immigration officer under the Immigration Act/Regulations in which event, and based on the doctrine *ex turpi causa non orictur actio*, the claim should be disallowed. In examining the evidence, this court should first, consider whether the plaintiff has satisfied the requirement of s 28A of the Act and then proceed to consider whether in those circumstances, whether the plaintiff is still entitled to the alleged loss if there is evidence to show it was gained illegally. Unfortunately, the learned sessions court judge with respect, did not direct his mind judicially or at all on this aspect of the evidence as to the illegal earnings but seemed to have awarded the loss of earnings as a matter of right even though

the evidence produced glaringly shows that the income was earned as a result of the plaintiff having worked illegally. In order to consider that the award by the learned sessions court judge was justified and correct in law, this court has to examine the evidence on those aspects as it relates to his earnings on its totality.

[114] In *his evidence in chief*, the plaintiff has testified on oath that he had a valid work permit to work in Malaysia with Lee Kam Seng Construction at the material time of the accident on 30 June 1996 and produced documents which were marked as ID2. Nevertheless, under cross examination by learned counsel for the defendant, the plaintiff had admitted that he did not have work permit or pass to work with Lee Kam Seng Construction (see p 37 of the record of appeal) and claimed that his work permit only entitled him to work with Faizal Enterprise. As to the work permit, the plaintiff's purported employer (PW4) had testified that at the material time when the plaintiff was working for him, he did not obtain a work permit for the plaintiff from the Immigration Department as the plaintiff had his own work permit to work for his company. PW4 had testified as follows:

> Semasa saya ambil Sukatno bekerja, saya tahu beliau dari negara asing, saya tidak dapat kelulusan dari Pejabat Imigresen, tetapi Sukatno ada permitnya sendiri.

On further cross examination by learned counsel for the third party, PW4 had testified:

> ... ketiadaan rubber stamp-sebab tidak perlu. Syarikat saya, Lee Kam Seng Construction tetapi dalam mukasurat ID2, ada sebut Faizal Enterprise sebab syarikat itu yang keluarkan permit. Pada masa beliau diambil bekerja, bukan untuk syarikat saya.

On the other hand, as rebuttal evidence, two immigration officers were called to testify on behalf of the defendant. Immigration officer (DW1) who is from the Foreign Workers Division of the Immigration Department had, inter alia, testified as follows:

> According to the immigration records, the plaintiff was not registered under Faizal Enterprise. The plaintiff was not one of the ten workers registered under Faizal Enterprise. When DW1 was referred to the chop in ID2, he replied that the chop was forged because it is not found in the department's record. As to the date 21 June 1996, DW1 said, the chop is also forged. DW1 had further testified that the status of the plaintiff is, he is an illegal worker in this country and he has committed an offence under s 6(1) of the Immigration Act 1959/1963 and he would be deported upon serving sentence. DW1 had also further testified that an employer who employs an illegal worker would also commit an offence. If the plaintiff was working with Lee Kam Seng Construction, Lee Kam Seng cannot take

a worker from another company. He has also committed an offence. Under cross examination, DW1 had testified that according to the record, the plaintiff's name is not included in his record. Looking at the chop, he is unable to inform if it was forged or not. The signature appears to be that of Azmi b Ahmad. If the worker is registered in Perak, there would records kept. The number XA 378188 which appears in ID2 is not found in their record.

[115] Section 6(1) of the Immigration Act 1963 states:

6 Control of entry into Malaysia.

(1) *No person other than a citizen shall enter Malaysia unless—*

(a) he is in possession of a valid Entry Permit lawfully issued to him under section 10;

(b) his name is endorsed upon a valid Entry Permit in accordance with section 12, and he is in the company of the holder of the Permit;

(c) he is in possession of a valid Pass lawfully issued to him to enter Malaysia; or

(d) he is exempted from this section by an order made under section 55.

(2) (Repealed).

(3) Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes.

[Am Act A1154 — Prior text read — Any person who contravenes subsection (1) shall be guilty of an offence against this Act.]

(4) *The burden of proof that a person entered Malaysia without contravening subsection (1) shall lie upon that person*, and in any prosecution for an offence under subsection (1), it shall not be necessary to specify in the charge the date, time, place or manner of the entry of such person into Malaysia, or by means of travel used for such entry, and such prosecution may be held at any place in Malaysia.

[116] The second witness, a senior immigration officer (DW2) who was attached to the International Passport Unit, Ipoh had testified, inter alia, as follows:

A search in the register of the Immigration Department, Ipoh did not have the name of the plaintiff as having been registered under Faizal Enterprise. Both the chop is suspected to be forged. The signature on ID2 does not belong to him and is suspected to be forged and the permit was not issued by the Immigration Department, Ipoh. Both the signatures on ID2 are not his. If the plaintiff had testified that he was working for Lee Kam Seng Construction, there was no permit given for the plaintiff to work for Lee Kam Seng Construction. The plaintiff who is a foreigner had worked without a valid permit and had stayed without a valid permit. In other words, DW2 had testified that the plaintiff is an illegal worker and if the plaintiff is found, he would be prosecuted under the Immigration Regulations.

Under cross examination, DW2 had testified that he is certain that the signature on ID2 is not his. DW2 had further testified when referred to receipt number H268156 that the passport is not found in the record of the Immigration Department, Ipoh.

[117] This court is of the view that if the plaintiff's income is found to be from illegal earnings, this court cannot convert the illegal earnings to become legal earnings in order to entertain or accommodate the plaintiff's claim for loss of future earnings however serious his injuries may be. The plaintiff's evidence that he had a valid work permit was challenged by the defence who had sufficiently casted doubt on his bare evidence that he has a valid work permit. In fact, both the immigration officers (DW1) and (DW2) have testified that the plaintiff did not have a valid work permit and the document produced by the plaintiff to show supposedly he had a valid work permit remains still as ID2 and appears to have been forged. In other words, there is no evidence produced by the plaintiff that he had a work permit to work with Lee Kam Seng construction at the material time. On the facts, the plaintiff had failed to establish on the balance of probabilities that he had a valid work permit or pass at the material time or that he would be issued with the same in the future.

ILLEGAL EARNINGS

[118] If the plaintiff has no legal status to remain in this country and is considered to be an illegal immigrant or an illegal worker, surely he cannot then claim to be entitled to loss of earnings which was derived from illegal earnings or as an illegal worker. In the instant case, the defence had produced sufficient evidence that the plaintiff is an illegal immigrant and his income was gained through illegal earnings. It is not then open to this court to strain the immigration laws and introduce an arbitrary right to accommodate or entertain the plaintiff's claim where the plaintiff had glaringly contravened the express provision of the immigration laws and where criminal proceedings

is contemplated against him if he is caught. This court is of the considered view that to allow this infringement of an express statute provision, arguably tantamount to opening a 'new horizon' which if allowed can go on at infinitum and open to interpretation according to whims and fancies of individual presiding officer and this ought to be discouraged for the sake or certainty, finality and public policy.

[119] In *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394, the Supreme Court disallowed the plaintiff's claim for loss of earning as it was found that the deceased's income was illegal. In that case, the plaintiff was the administrator of the estate of the deceased who was killed in a motor accident in 1977. At the time when the accident occurred, the deceased had operated a taxi. The license to operate the taxi which was issued in 1976 in the name of the deceased's father and was expressed to be valid until 1983 when it would then expire. However, the deceased had continued to operate the taxi after the demised of his father in 1977 without having obtained the license to be transferred to his own name or to the name of the administrator of the estate of his father. Although there was evidence that some of the officers in the Road Transport Department were aware of the taxi being illegally operated, the deceased was never prosecuted. The Supreme Court in disallowing the claim by the estate on the basis that the income was obtained through illegal earnings said at pp 399, 401–402:

> It is to be borne in mind that the Road Transport Licensing Board under the said Ordinance was separate and independent from the civil servants that staffed the Road Transport Department engaged in overseeing, inter alia, the compliance by the public of the provisions of the said Ordinance, while members of the said licensing board were appointed by the Minister of Transport usually from members of the public for granting, revocation or suspension of public service vehicle licences such as the licence for a taxi. The fact that officers of the said department did not initiate any prosecution for any offence in respect of the use of the taxi licence could not legally amount to any such previous consent of the licensing board to the continued use of the taxi by the deceased as stated in s 126 above.
>
> Such use of the taxi licence by the deceased could undoubtedly be an offence under s 126 of the Road Traffic Ordinance 1958, notwithstanding the extenuating circumstances accompanying such user which could have mitigated greatly the punishment of the deceased had he been prosecuted. The continued use of the taxi licence by the deceased was undoubtedly also illegal, and the income earned from such illegal activity was therefore illegally obtained. It was not disputed by the parties herein that such income had amounted to about RM1,500 per month.
>
> We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is

against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun*; *Burns*; *Lebagge* and *Dhlamini*, supra and approve the dictum in question in *Yaacob*. We therefore uphold the decision of the learned judge in the court below and that of the learned Registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operation of the taxi should be disallowed; because *ex turpi causanon oritur actio* or in other words, such claim would be against public policy. We would like to emphasize the timely caution of the learned Chief Justice of Singapore in *Ooi*'s case, supra that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.

We have in deciding so, considered as to whether we should make a distinction between income earned from a very minor transgression of law such as that as revealed by the facts in the instant appeal and those cases of unlicensed hawking on the one hand and those serious crimes like drug trafficking and armed robbery on the other hand. Such distinction in reality turns on the question of degree of criminality of conduct. Such degree will not alter the basic nature of criminality of such conduct. There are other reasons also for disregarding such distinction. There is the great practical difficulty as to when to draw the line between such minor offences and the more serious ones. To attempt to do so would certainly lead to a good deal of confusion and uncertainties, a situation much dreaded by all. To attempt to do so is like trying to distinguish between offences against the rights established by God and those against rights established by man. It is an irrelevant exercise at the present times.

We have realised, of course, that in any case when the claim for dependency is solely based on income earned from an illegal activity, the dependants, though completely innocent of the illegality, will suffer an injustice and the tortfeasor, will obtain an undeserving windfall. The dependants' interests are thus seen to be irreconcilable with the interests of the law; the latter are, to provide certainty of the law but yet give rise to an injustice in such a situation.

The interests of the law are beyond providing mere certainty of the law. They are also to protect society from illegal activities which, if allowed to pass without judicial castigation would encourage such illegal activities, and allow the perpetrators to set an example to fellow-citizens to regard such illegal activities with tolerance and a desire to follow the same. The insidious consequences are not hard to imagine. With religion losing its grip to significant numbers of society, the interests of law in this sense would have to be rigorously upheld. We therefore are of the opinion that such personal interests of such dependants or other claimants would have to be sacrificed for the greater interests of the law.

[120] On the other hand, the Court of Appeal in *Tay Lye Seng & Anor v Nazori bin Teh & Anor* [1998] 3 MLJ 873, had allowed the claim of the plaintiff although it was established that the income was gained through illegal earnings. The decision in the Court of Appeal was based on its own sets

of facts and can be distinguished with the facts in the present case before this court. In *Tay Lye Seng*, the respondent (plaintiff), a Malaysian citizen who was working in Singapore was involved in a road accident. The respondent (plaintiff) who had suffered injuries then claimed, inter alia for loss of earnings against the appellant (defendant). It was the contention of the appellant (defendant) that the claim made by the respondent (plaintiff) for the loss of earnings ought to be dismissed as at the time of the accident, the work permit of the respondent (plaintiff) had expired four months prior to the accident and as such the respondent (plaintiff) was working illegally in Singapore. The Court of Appeal however, allowed the respondent's (plaintiff) claim on the basis that prior to the accident, the plaintiff had in fact a valid work permit and the obligation of renewing that permit had lied with the respondent's (plaintiff's) employer although there was no evidence that the employer had taken any steps to apply for the renewal. Therefore, the Court of Appeal had held that the respondent (plaintiff) cannot be found responsible for such omission by the employer. The Court of Appeal said at p 879 as follows:

> ... the fact that the first respondent had no valid work permit, per se, cannot affect his claim for loss of earnings in Singapore. This is so as unlike *Chua*'s case, the first respondent was working legally in Singapore initially. He had a valid work permit issued by the Singapore authorities but unfortunately that expired four months before the accident. We have been told that the obligation to renew the work permit lies squarely with the first respondent's employers and since there is no evidence that they had done so, we consider that the first respondent had not been culpably responsible for the predicament that he had found himself to be. Under these circumstances we consider that the maxim *ex turpi causa non oritur actio* lacked moral justification and to that end is not applicable to the instant appeal before us.

[121] In *Wakil Diri Bagi Harta Pusaka Atas Rosli Md Nor (si mati) & Ors v TP Saffeer & Anor* [1998] 3 AMR 2619, the deceased, an Indian national who was working in the employment of Zam Zam restaurant died in accident on 19 May 1991 on his way to the market to buy vegetables. During his employment, he earned about RM1,250 per month. He did not have a work permit and he did not contribute towards the EPF or SOCSO. The appellants/defendants had contended that his estate could not benefit for the loss of earnings as the deceased had obtained his income through illegal earnings. In that case, PW1 for Zam Zam Restaurant had testified that the deceased had a red identity card and had been in Malaysia since childhood. PW1 had also testified that he knew the deceased had to have a work permit and PW1 had promised the deceased that he would obtain a work permit for the deceased. His Lordship Abdul Malik Ishak J (now JCA) said at p 251:

But the illegality of the deceased's employment could have been legitimised. At this stage, a repetition of the facts is necessary. The deceased held a red identity card and according to SP1 the deceased was a permanent resident. At the time of the accident, the deceased's father was in Malaysia. SP1 promised to obtain the work permit for the deceased within a period of three months from the date of recruitment. There was no evidence to show that the deceased was unlikely to obtain a work permit. The same scenario appeared in *Nazori bin Teh & Anor v Tay Lye Seng & Anor* [1995] MLJU 154 where the defendant failed to show that the first plaintiff was unlikely to get a work permit. It was for this reason that the learned judge was of the view that the illegality was capable of being legitimised. In my judgment, the earnings of the deceased can, in law, be legitimised and that being the case the earnings derived as a cook from Zam Zam restaurant was not illegal. Those earnings can be computed for purposes of loss of earnings sustained by the widow and her son. This was my judgment and I so hold accordingly.

[122] In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, Kerr LJ said at p 35 said as follows:

> The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts …

[123] In *Thackwell v Barclays Bank Plc* [1986] 1 All ER 676, Hutchison J at p 687 said as follows:

> Conscience test which involves two question: 'first, whether there had been illegality of which the court should take notice and, second, whether in all circumstances it would be an affront to the public conscience if by affording him the relief sought the court was seen to be indirectly assisting or encouraging the plaintiff in his criminal act' (see *Savanis*).
>
> If the maxim *ex turpi causa* is not applied to the facts in the instant case against the plaintiff, it would possibly have the effect of encouraging the commission of the similar offence by other illegal immigrant.

[124] In *Ooi Han Sun v Bee Hua Meng* [1991] 3 MLJ 219, Yong Pung How CJ said at p 224:

> The immigration laws and regulations which require work permit to be obtained by foreign workers before they can work in Singapore were not design merely to raise a little extra revenue, but to implement a basic public policy. To compensate

the first plaintiff on the basis of what he might have earned by working illegally in Singapore without a valid work permit would be against public policy and wholly improper (see *Yaakob v Lai Man Keong & Anor* [1986] 2 MLJ 317; *Chua Kim Suan & Anor v Govt of Malaysia & Anor* [1994] 1 MLJ 394).

[125] In the instant case, it must be made clear that there is no evidence that PW4 or anyone on behalf of the plaintiff had indeed applied for a work permit or was in the process of applying for the same or the least, if he was given the impression or informed by any of his employers that a valid work permit would be obtained for him. There is also no evidence that the plaintiff was likely to obtain a valid work permit. The burden of proof that the illegality was capable of being legitimised is on the plaintiff and he must produce proper and sufficient material before the court to show that the earnings which were received illegally could be legitimised. Unfortunately, there is no such material before the court. In addition, the documents produced by the plaintiff and marked as ID2 purported to be a work permit or a passport appears to be forged and there have been manipulation by PW4 to employ the plaintiff when PW4 knew that the plaintiff was not his employee and he did not apply for any work permit for the plaintiff. There is also no evidence that PW4 had ever applied for a permit for the plaintiff. All he has stated is the bare evidence that the plaintiff had a permit of his own and this has not been explained by PW4 as an employer. Further, there is evidence from the immigration authorities (DW1) and (DW2) that they were contemplating to institute criminal proceeding against the plaintiff under the Immigration Act/Regulations.

[126] In the circumstances, the decision in *Wakil Diri Bagi Harta Pusaka Rosli Md Nor (si mati) & Ors v TP Safeer & Ors* which had followed the decision of the High Court in *Nazori bin Teh & Anor v Tay Lye Seng & Anor* [1995] MLJU 154 to legitimise the illegal earnings, with respect, had to be distinguished on the facts and the background in the instant case. When the facts in the two cases are compared, to the facts and the background in the instant case, this court finds that the defendant has produced sufficient rebuttal evidence through DW1 and DW2 that the illegality or illegal earnings is unlikely to be legitimised even though it was the duty of the plaintiff to produce sufficient evidence that he had a valid work permit or pass at the material time which he had failed to do so and there was no duty on the part of the defendant to adduce any rebuttal evidence.

[127] As to the decision of the Court of Appeal in *Tay Lye Seng & Anor v Nazori bin Teh & Anor* [1998] 3 MLJ 873, this court with respect, has its reservation of applying the observation or dicta of the Court of Appeal where

it is stated: … *the maxim ex turpi causa non oritur actio* lacked 'moral justification' and that observation cannot be applied to legal reasoning where the law prohibits illegal workers in this jurisdiction. Further, 'morality and justice are not merely alien but hostile'. In any event, public interest or public policy must override moral justification. However unfair it may be to deprive the plaintiff of this earnings, this court cannot overlook the fact that the income was earned illegally and in contravention of the express provision of the Immigration Act/Regulations. Therefore, the decision of this court cannot be influenced by extraneous consideration or by taking into account moral justification to legitimise an illegal act coupled with the fact that the document produced and purported to be a work permit appears to have been forged and even if this court or the trial court had acted in good faith. In fact a great deal of the facts adduced by the defence through the immigration officers DW1 and DW2 have not been seriously challenged by the plaintiff that he did not have a valid work permit or pass at the material time. The principle of public policy should be respected by the courts. This court will not lend its aid to the plaintiff whose claim for loss of future earnings is founded upon an illegal act or the transgression of a positive law of this country. (*ex dolo malo non aritur actio*). An important duty in the enforcement of the immigration laws/regulations against illegal workers and illegal immigrants in this country would be frustrated if the doctrine *ex turpi causa non oritur actio* or the compelling policy reason was not recognised by the courts and also where the claim is tainted and did not justify an award which is based on illegal earnings.

[128] Legitimate expectation or informal understanding or implied understanding can arise only on restricted circumstances and cannot be used to graft into a label where the earnings ab initio is illegal and was earned by contravening the immigration laws and it is not the function of this court to fill in gaps in order to justify an order which is beyond the scope and intent of the immigration laws. This court must be cautious to overstretch the judicial power or discretion to accommodate the plaintiff by applying moral justification when the act of the plaintiff contravenes the immigration laws and regulations which requires a foreigner to obtain a valid work permit. This court is of the respectful view that sanctity and certainty of the immigration laws have to be maintained and strictly observed, otherwise it would undermine, frustrate and tantamount to relieving the offender in the instant case, the plaintiff, from observing or complying with the requirements of the Immigration laws in this country. There would no doubt be chaotic state of affairs in this country if this court were to condone and freely legitimize the illegal earnings in violation of the Immigration laws and indirectly condone foreigners to work in this country without a valid work permit or pass and identification as required by law. In fact, special courts have been set up in

this country to deal with illegal immigrants and illegal workers who are charged in court due to the increased number of registration for such offences under the Immigration Act/Regulations by foreigners who enter this country and this shows the seriousness of the Government to deal with such offenders as speedily as possible.

[129] Immigration laws which are introduced amongst other reasons for the protection of national security and safety cannot be sacrificed in favour of the plaintiff even though it may be seen to result in some injustice or unfairness to a private individual like the plaintiff. Accordingly, this court ought not to unlock the gates which is shut or prohibited by the legislature from entertaining a claim which is found to be earned illegally by an illegal worker or an illegal immigrant.

[130] The formulation of legitimising the illegality has to be embarked upon with caution and cannot be placed in a strait jacket as it is not embodied and it must vary from case to case and from one situation to another. (See *McInness v Onslaw Fane & Ors* [1978] 3 All ER 211; *Schmidt & Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904, Ch D). In fact, it is manifest that the plaintiff had already made up his mind to work for PW4 regardless of the fact, first, he did not have a valid work permit, secondly he did not have a valid work permit or pass to work for PW4 and thirdly, he did not even have a valid work permit or pass to work for Faizal Construction. In the circumstances, where may the court really draw a line between what is acceptable or proper and improper to legitimise illegal earnings and how does the court determine the propriety or impropriety of a worker receiving earnings illegally.

[131] Legislature has prohibited foreigners working in this country without a valid work permit or pass. The court cannot obviously then usurp the function of the Legislature and legitimise illegality by arbitrary means and in clear defiance of the immigration laws and regulations. In fact, no person should be permitted or be able to claim benefit arising out of a criminal offence due to his own or willful breach of the immigration laws and this is based on the broad rule of public policy. It is impossible and undesirable for this court to condone an illegal act or catalogue any other circumstances in which this court has the discretion to legitimise the illegal earnings as each case would have to be considered in the light of its own facts. Therefore, it is not desirable to lay down a general inflexible rule that all illegal earnings ought to be legitimised. The circumstances and surrounding facts are found to be matters of considerable importance. Accordingly, the plaintiff's claim for loss of earning ought not to have been awarded and ought to be set aside.

[132] In conclusion, upon considering the totality of both the oral and documentary evidence as contained in both the records of appeal, the submission by all three parties with the authorities, this court is of the respectful view that this is an appropriate case for appellate intervention as this court in its appellate jurisdiction is convinced that, first, the learned sessions court judge who made the findings on liability did not make a proper evaluation of the evidence judicially and did not have the advantage of appreciating the evidence as he was not a trier of fact or had the audio visual advantage reserved to a trial judge. Secondly, there was no proper judicial appreciation of the evidence recorded at the trial, thirdly, the findings on liability made by the learned sessions court judge does not accord with the probabilities of the case, fourthly, findings on liability is conflicting and is grossly against the weight of the totality of the evidence and fifthly, the learned sessions court judge had misdirected himself on the facts and the law of negligence and made findings on liability on speculation or conjecture (see *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131) and sixthly, the apportionment of liability which was imported from other cases are poles apart on the facts, and was applied mechanically to the instant case and without any legal basis.

[133] In the interests of justice and reasons as given above, this court has to intervene and reverse the findings on liability made by the third learned sessions court judge who did not see or hear the witnesses and accordingly, set aside the findings of 50% liability against the defendant as it cannot be sustained in law or on the facts. In *Edwards (Inspector of Taxes) v Bairstow & Anor* [1955] 3 All ER 48, Lord Radcliffe said:

> It may be the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances … the court must intervene. I do not think that it matters whether the state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three.

[134] In accordance with reasons, law and justice, the appeal by the defendant against liability is allowed. The finding of 50% liability against the defendant and 50% contributory negligence against the plaintiff is set aside and the plaintiff's claim against the defendant is dismissed with costs. As to the award for loss of future earnings, being RM153,600, the appeal by the defendant is also allowed and the award is set aside. The defendant is awarded costs of this appeal which is to be borne by the plaintiff. The dismissal of the

defendant's claim against the third party is confirmed. However, there is no costs awarded to the third party.

Appeal allowed with costs.

Reported by Sally Kee